Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

MICHAEL C. COLLINS, LESLIE COLLINS, and BARBARA COLLINS, Plaintiffs

v.

SCHWEITZER, INC., and WORLD WIDE SKI CORP dba NASTAR, Defendants

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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185 pp

QUESTIONS PRESENTED

I. Does the Idaho Ski Statute deny Collins equal protection because it denies him the ability to seek redress for harm negligently inflicted upon him by the ski area and the statute is not rationally related to the purpose of protecting the ski area from liability for those risks inherent in the sport of skiing?

II. Did the lower court err by construing the Idaho Ski Statute to preclude Collins' claim when Collins' injury was not caused by an inherent risk of skiing?

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IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL C. COLLINS, LESLIE COLLINS, and BARBARA COLLINS

v.

SCHWEITZER, INC., and WORLD WIDE SKI CORP dba NASTAR

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Michael Collins, Leslie Collins and Barbara Collins ("Collins") pray that the Supreme Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

CITATION TO THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (No. 91-36183) is reported at 21 F.3d 1491. The opinion of the United States District Court for the District of Idaho (No. CV-89-3056-HLR) is reported at 774 F. Supp. 1253. The judgment of the court of appeals was entered

April 26, 1994. The request for rehearing was denied on June 23, 1994.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on April 26, 1994. The court of appeals denied the rehearing on June 23, 1994. The jurisdiction of this court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Idaho Code §§ 6-1101 through 6-1109 (Responsibilities and Liabilities of Skiers and Ski Area Operators Act); Idaho Constitution Article I § 18;

> "Justice to be freely and speedily administered. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered without sale, denial, delay or prejudice."

United States Constitution, Fourteenth Amendment, § 1:

> "All persons born or naturalized in the

United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

I. STATEMENT OF THE CASE

The District Court granted summary judgment holding that the Idaho Skier Statute granted immunity for the ski area's active negligence dismissing Collins' claims against those entities.

A. PROCEDURAL HISTORY

Michael Collins, a resident of the State of Washington, and his two daughters, Leslie and Barbara Collins (collectively "Collins"), brought this action for personal injury and other damages against Schweitzer, Inc., (Schweitzer) an Idaho Corporation, and World Wide Ski Corp. d/b/a NASTAR, a Colorado Corporation. Plaintiffs filed suit in the United States District Court for the Eastern

District of Washington. Defendants contested jurisdiction, and the court transferred venue to the United States District Court for the District of Idaho. Jurisdiction in the District Court was founded on diversity jurisdiction 28 U.S.C. §1231 as the matter was between citizens of different states and exceeded $50,000.00. On the motions of Schweitzer and NASTAR the district court granted summary judgment dismissing Collins' claims against those entities. Collins appealed the summary judgment to the United States Court of Appeals for the Ninth Circuit. That court affirmed.[1]

B. FACTS

The active negligence of an Idaho Ski area proximately rendered Michael Collins a quadriplegic while participating in a recreation ski race open to the public. The Idaho Ski Statute, as interpreted by the

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[1]All other defendants have been dismissed from the case.

lower court, shields the ski area from all negligent activities and is not rationally related to its stated purpose and therefore violates the 14th Amendment to the United States Constitution.

Michael Collins was a single parent. He worked for Burlington Northern Railroad for twenty-three years before his injury. He earned approximately $50,000.00 per year. CR 66, p.1. His two daughters, Leslie Collins and Barbara Collins, were both teenagers at the time of their father's injury. Michael, Leslie, and Barbara are all Washington State residents.

Michael Collins was an advanced recreational skier and had skied at the Schweitzer ski area for several years prior to his injury on January 31, 1988. Schweitzer operates the Schweitzer ski area near Sandpoint, Idaho. For several years prior to the injury, Schweitzer contracted with NASTAR to allow Schweitzer to hold

NASTAR recreational ski races for the general skiing public. The name "NASTAR" is owned and protected by trademark by World Wide Ski Corporation and the acronym stands for "national standard race." World Wide Ski Corporation allows ski areas to conduct NASTAR ski races pursuant to the terms of a written agreement with the ski areas. Ski areas hold the races using the Nastar name, materials, and rules. NASTAR's ski races are open to skiers of all ages and abilities from intermediate to advanced. The ski races must be set in accordance with accepted skiing standards as the general public from young children through senior adults is encouraged to ski down a race course as fast as their ability will allow them to ski.

The ski area, by conducting a NASTAR ski race increases the likelihood of a skier falling, and expects that a certain number of ski racers will fall while competing in the NASTAR race. The ski area must therefore

design the ski race in accordance with the industry's standards, which would require that the ski race be set in a manner which avoids dangerous obstacles which may injure a skier if he falls, such as ski towers, or if the area chooses to set the ski race near a dangerous obstacle, it must protect the skier from colliding with that obstacle by establishing safety barriers in accordance with national skiing standards.

On January 31, 1988, the ending location of Schweitzer's NASTAR ski race had been negligently set dangerously close to a ski lift tower in violation of ski industry standards. To compound the problem, Schweitzer negligently placed inadequate netting in front of the ski lift tower, giving the illusion of safety but being totally inadequate to keep a skier from skiing through the barrier and into the tower. In addition, the ski terrain at the finish line became steeper and industry

standards including the written instructions of NASTAR required that the finish line of the ski area be less steep and have a "long, level well marked and fenced off runout".

While skiing through the finish line, Michael Collins, through no fault of his own, fell on the hard packed snow directly above the ski lift tower, skidded through the netting, and struck the ski lift tower, breaking his neck and in that instant becoming a quadriplegic.

II. REASONS FOR GRANTING THE PETITION

A. THE IDAHO SKI AREA STATUTE IS NOT RATIONALLY RELATED TO THE STATUTE'S STATED PURPOSE, AND DENIES ALL SKIERS (INCLUDING COLLINS) EQUAL PROTECTION OF THE LAWS AS GUARANTEED BY THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Idaho ski area operators statute, Idaho Code §§ 6-1101 to 6-1109, is not rationally related to the statute's stated purpose, and denies all skiers (including Collins) equal protection of the laws as guaranteed by the Fourteenth Amendment.

As with any statutory interpretation, the proper starting point is the language of the statute. Lewis v. United States, 445 U.S. 55, 60, 100 S. Ct. 915, 918, 63 L.Ed.2d 198 (1980). The purpose of the act is to relieve ski area operators of liability for risks that they cannot control; skiers assume the risk of harm from those uncontrollable ("inherent") risks. Idaho Code § 6-1101 provides as follows:

> "The legislature finds that the sport of skiing is practiced by a large number of citizens of this state and also attracts a large number of nonresidents, significantly contributing to the economy of Idaho. Since it is recognized that there are inherent risks in the sport of skiing which should be understood by each skier and which are essentially impossible to eliminate by the ski area operation, it is the purpose of this chapter to define those areas of responsibility and affirmative acts for which ski area operators shall be liable for loss, damage or injury, and to define those risks which the skier expressly assumes and for which there can be no recovery."

Although the act purports to state that the ski area operator shall be liable for certain acts, the Idaho Supreme Court in the

case of Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990) held that the ski area operators under the act have no standard of care to follow in carrying out any of the duties described in the statute including the duty relied on by Collins in 6-1103(10) which required a ski area operator not to cause injury negligently. The District Court as well as the Ninth Circuit Court of Appeals adopted the statutory interpretation of the Northcutt court, which essentially eliminates any cause of action of a skier against a ski area operator for its active negligence.

Traditionally equal protection issues were scrutinized judicially on two different levels. One level involved a strict scrutiny test by which the courts evaluated statutes that discriminated against suspect classes[2] or impinged upon the exercise of a

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[2] Plyler v. Doe, 457 U.S. 202, 216-17, 102 S. Ct. 2382, 72 L.Ed.2d 1401, reh'g denied, 458 U.S. 1131 (1982).

"fundamental right".[3] Under the strict scrutiny test the state must show that the statutory scheme was necessary to promote a compelling governmental interest.

The second level involved a "rational basis" test under which the legislation that does not involve a fundamental right or a suspect class is evaluated. Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973).

To determine whether a statute is rational, a court must consider the law's logical tendency to promote its stated goals as against its tendency to impair other, more important, goals. See Bell v. Hongisto, 501 F.2d 346, 355 n.12 (9th Cir. 1974), cert. denied, 420 U.S. 962 (1975). The evaluation of rationality necessarily involves some inquiry into the correspondence between the

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[3] Trimble v. Gordon, 430 U.S. 762, 97 S. Ct. 1459, 52 L.Ed.2d 31 (1977); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 93 S. Ct. 1278, 36 L.Ed.2d 16, reh'g denied, 411 U.S. 959 (1973).

legislative goals and means. Heightened scrutiny within the framework of the rational basis test, therefore, requires a balancing of state interests and personal rights. See Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 105 S. Ct. 3249, 3260, 87 L.Ed.2d 313 (1985). A court must examine the nature of the class burden, the importance of the rights affected, and the extent to which they are impaired, and must balance these considerations against the significance of the governmental interests. See Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173, 92 S. Ct. 1400, 1405-06, 31 L.Ed.2d 768 (1972). The State of Idaho has determined that access to the courts is a fundamental right. Indeed, section 18, Article I of the Idaho Constitution, the Declaration of Rights, provides as follows:

> "Justice to be freely and speedily administered. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property or character, and right and justice shall be administered

without sale, denial, delay or prejudice."

The construction by the trial court herein effectively precludes liability on any basis for a ski area operator.[4]

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[4]This construction of the statute renders the Idaho statute more restrictive than any other skier statute in the United States. OR. REV. STAT. § 30.970-.990 (skier accepts and assumes the inherent risks of skiing in so far as they are reasonably obvious, expected or necessary) Jessup v. Mt. Bachelor, Inc., 101 Or.App. 670, 792 P.2d 1232, review denied, 799 P.2d 646 (1990) (the legislature intended to bar recovery for an injury caused solely by inherent risk of skiing. But, if the injury is caused by a combination of an inherent risk of skiing and operator negligence, then the doctrine of comparative fault would apply.); Montana: After Brewer, which is discussed below, Montana amended its statute. MONT. CODE ANN. § 23-2-733 now states that a ski area operator owes a duty of reasonable care to a skier. Nonetheless, MONT. CODE ANN. § 23-2-736(4) notes that a skier assumes all legal responsibility for injury or damage resulting from the inherent risks in skiing. Those risks include clearly visible or plainly marked improvements or equipment; Nevada: NEV. REV. STAT. § 455A.110 imposes duty on skier to maintain a proper lookout and control of his speed to avoid downhill objects and skier's to the best of his ability; Alaska: ALASKA STAT. § 09.65.135 provides that a skier may not recover from a ski area operator for injury resulting from an inherent risk of skiing unless the ski area operator failed to provide information required by the statute; Washington: WASH. REV. CODE § 70.117.020(6)

A Montana case which challenged a ski statute very similar to the Idaho Statute as violative of the 14th Amendment equal protection rights was the case of Brewer v. Ski-Lift, Inc., 762 P.2d 226, 230 (Mont. 1988). The court analyzed the Montana statute in a fashion similar to the way the court below construed the Idaho statute. The Montana Court stated that:

> A fair reading of the underlined portions of the above statutes prohibits the skier from obtaining legal recourse against an operator even if the injury is proximately caused by the negligent

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Because of the inherent risks in the sport of skiing all person using the ski hill shall exercise reasonable care for their own safety. Despite the statute, the ski area operator has a duty to discover hazards that are not obvious, and repair those hazards or warn the skier of the hazard. Codd v. Stevens Pass, Inc., 45 Wn. App. 393, 399, 401, 725 P.2d 1008 (1986), review denied 107 Wash.2d 1020 (1987). Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1044 (Utah 1991) (though UTAH CODE ANN § 78-27-53 defines collisions with other skiers as an inherent risk of skiing, if the ski area could have prevented Clover's collision with another skier through the use of ordinary care, then such a collision was not an inherent risk of skiing and Clover may recover); California: See McDaniel v. More, 210 Cal. App. 2d 26, 26 Cal. Rptr. 140 (1962).

> or even intentional actions of the operator.

The statute was held unconstitutional. Id. The court acknowledged that the state does indeed have a legitimate interest in protecting the economic vitality of the ski industry, but then went on to state as follows:

> [T]here is no rational relationship between this purpose and requiring that skier's assume all risks for injuries regardless of the cause and regardless of the presence of negligence or intentional conduct on the part of the ski area operator.

Id. The court concluded that the statute could not even pass the minimum rationality test. Id.

In a similar vein, the West Virginia Supreme Court addressed a challenge to that state's Skiing Responsibility Act. The plaintiff challenged the constitutionality of the statute. The court upheld the statute, based on a holding that the statute did not immunize operators for intentional torts or for negligence, where either involved a

violation of the operator's duty to maintain the ski area in a reasonably safe condition. Lewis v. Canaan Valley Resorts, Inc., 408 S.E.2d 634, 643 (W.Va. 1991). The court noted that the application of the statute only to immunize the ski area operator for inherent risks that are essentially impossible to eliminate "avoid[ed] an application of the Act in a manner which would violate equal protection principles." Lewis, 408 S.E.2d at 643.

The ski area operators immunity scheme is not rationally related to the stated purpose. The Idaho Legislature found that skiing was important for the state, both in terms of the number of people who participate in the sport and in terms of the economic contribution to the state's economy. Recognizing that there are some risks inherent in the sport of skiing, the ski area operator statute sought to define those areas of responsibility for which ski area

operators shall be liable, and to define those risks that the skier expressly assumes and for which there can be no recovery. Idaho Code § 6-1101.

The Idaho ski area operators statute, as interpreted by the court of appeals is not rationally related to the purpose of the statute. The purpose of protecting the ski area against claims for injuries the area could not prevent does not require protecting the ski area operator from injuries it could prevent. The court in Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991) faced just such an argument. There, the plaintiff was injured when an employee of the ski area went over a jump and collided with her. Among other defenses, the ski area operator argued that it was immune from liability because of the state's inherent risk of skiing statute. Clover, 808 P.2d at 10392. The plaintiff asserted negligent design and maintenance claims, which the court dismissed on the

basis that the plaintiff had collided with another skier, and such a collision was listed as an inherent risk of skiing. Clover, 808 P.2d at 1043. The Utah Supreme Court reversed, noting that such a result would lead to absurd results:

> "For example, if a skier loses control and falls by reason of the negligence of an operator, recovery for injury would depend on whether, in the fall, the skier collides with a danger listed in [the section listing the inherent risks of skiing]. Such a result is entirely arbitrary."

Thus, for the Idaho statute, a ski area operator could be riding a snow mobile on a ski hill with the intent of putting signs on the hill, and negligently run over a skier standing in the snow. The skier would have no recourse for this injury. If the snowmobile had struck a non-skier that person would have recourse. If a person other than a ski area operator was driving the same snow mobile, the injured skier would have legal recourse. If Collins had been in the ski area parking lot and been struck by a vehicle

driven by a ski area operator while engaged in a statutory duty Collins would have no recourse for his injury. If the vehicle struck a non-skier there would be recourse. Such a result does not further the purpose of the statute, and the statute should be struck down to the extent it purports to immunize the ski area operator for its negligent or intentional acts within its control.

The ski areas have the political organization to impose laws on the skiers. Many of the skiers at the Idaho destination ski resorts are from out of state and would not be aware of the legislation or have the ability to organize a political campaign to combat against the same.

The Idaho Legislature in its stated purpose recognized that there are inherent risks in the sport of skiing which should be understood by each skier and which are essentially impossible to eliminate by the ski area operation. It was the purpose of

the statute to give economic protection to ski areas for injury claims by skiers over which the ski area had no control and to define those area of responsibility and affirmative acts for which ski area operators shall be liable for loss, damage or injury, and to define those risks which the skier expressly assumes and for which there can be no recovery.

The Idaho statute grants blanket immunity to ski area operators and is not rationally related to the stated purposes of protecting ski areas from claims of injured skiers over which the ski area operator has no control. The statute unfairly discriminates against skiers and denies Collins the equal protection of the laws as guaranteed by the 14th Amendment to the United States Constitution.

B. THE QUESTION OF SKI AREA IMMUNITY FOR NEGLIGENT AND INTENTIONAL ACTS IS IMPORTANT.

The question of ski area immunity for

negligent and intentional acts is important throughout the country. Many states have enacted statutes that immunize ski area operators for some risks associated with skiing, although Idaho is the only state whose statute has been interpreted to give a ski area operator blanket immunity for its active negligent acts. See Alaska Stat. § 09.65.135; Colo. Rev. Stat. Ann. § 33-44-109; Idaho Code §§ 6-1101 to 1109; Maine Rev. Stat. Ann. tit. 26, § 488; Mass. Gen Laws Ann. ch. 143, § 710; Mich. Stat. 408.342; Mont. Code Ann. §§ 23-2-731, 736; N.H. Rev. Stat. Ann. § 225-A:24; N.J. Stat. Ann. §§ 5:13-5 to 6; N.M. Stat. Ann. § 24-15-10; N.Y. General Obligations Law §§ 18-101, 105, 106; N.D. Cent. Code § 53-09-06; Or. Rev. Stat. §§ 30.970 to .975; Pa. Stat. Ann. § 7102; Tenn. Code Ann. § 68-114-103; Utah Code Ann. §§ 78-27-51 to 53; Vt. Stat. Ann. tit. 12 § 1037; Wash. Rev. Code § 70.117.020; W.Va. Code § 20-3A-5.

In challenges to those statutes, in most cases, the courts have upheld statutes immunizing ski area operators against risks inherent in the sport of skiing, because those statutes were not construed to immunize the ski area operators for active negligence or intentional torts. See Pizza v. Wolf Creek Ski Development Corp., 711 P.2d 671, 679 (Colo. 1985)(rebuttable presumption that skier is responsible for a collision on the slopes); Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159, 1164-66 (1990)(ski area operator may be liable for failing to follow a statutory duty that does not relate to eliminating, altering, controlling or lessening the inherent risks of skiing. Operator may also be liable for negligently injuring skier); Schmitz v. Cannonsburg Skiing Corp., 170 Mich. App. 692, 428 N.W.2d 742, 743 (1988)("generally, if the 'dangers' listed in the statute do not exist, there is no skiing"); Grieb v. Alpine Valley Ski

Area, Inc., 155 Mich. App. 484, 400 N.W.2d 653, 655-56 (1986)(skiers assume the obvious and necessary dangers of skiing); Lewis, 408 S.E.2d at 643 (operator not immunized against intentional torts or negligence where either involves violation of duty to maintain ski areas in reasonably safe condition); see also Kelleher v. Big Sky of Montana, 642 F.Supp. 1128, 1130-31 (D.Mont. 1986)(statute merely identifies risks inherent in skiing; statute does not limit skier's ability to bring action based on operator negligence). Where the statute has been interpreted as including the active negligent or intentional acts of the ski area operator, it has been struck down as a violation of the equal protection guarantee. Brewer, 762 P.2d at 231.

A severe injustice has been inflicted on Collins by not affording him equal protection under the laws of the State of Idaho, but on a larger scale, this case will be looked to for guidelines in reference to the statutes

throughout the States involved in the ski industry. The Court should grant a writ of certiorari to give guidelines regarding regulation of liability in skiing and other sporting industries to assure that all citizens of the United States are afforded equal protection under the 14th Amendment of the United States Constitution.

C. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

The Court of Appeals wrongly decided that the Idaho act immunizing ski areas applied to the ski area negligence that caused Mr. Collins' injuries.

The Idaho court in Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159, 1162-63 (1990) concluded that ski areas owe a duty of care to the skiers they serve. In reaching its determination as to the duty owed one competing in a ski race, the lower courts overlooked the Idaho court's holding. The lower courts also overlooked the purpose as stated in the statute itself: to protect

an important economic sector by relieving it of liability for those risks that are "*essentially impossible to eliminate.*" (emphasis added) Idaho Code § 6-1101. The risks here were not impossible to eliminate. This court should reverse, and remand the case for a trial on the merits.

CONCLUSION

The court should grant the petition for a writ of certiorari and strike down that portion of the Idaho Ski Statute which denies Collins equal protection of the laws.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL C. COLLINS, LESLIE COLLINS, MARK VOVOS, as guardian ad litem for BARBARA COLLINS	)	
Plaintiffs-Appellants,	)	NO. 91-36183 D.C. No. CV-89-3056-HLR
v.	)	OPINION
SCHWEITZER, INC., WORLD WIDE SKI CORP., dba NASTAR, RIBLET TRAMWAY COMPANY	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued and Submitted
June 11, 1993, Seattle, Washington

Filed April 26, 1994

Before: Melvin Brunetti, Edward Leavy, and Stephen S. Trott, Circuit Judges.

Opinion by Judge Brunetti; Dissent by Judge Leavy

SUMMARY

The court of appeals affirmed a district court judgment. The court held that under Idaho law, a skier who struck a lift tower during an amateur race at a ski resort could not recover from the ski area operator for the injuries that he sustained.

Appellee Schweitzer, Inc., operates a ski resort area in northern Idaho. Appellee World Wide Ski Corp. (NASTAR) promoted an amateur ski race by providing the ski area with a package program for staging the race. Appellant Michael Collins skied in a "dual format" slalom race. The finish line was approximately 123 feet above and 48 feet to the right of a chairlift tower. Schweitzer placed a nylon net fencing in front of the tower, and padding around the base of the tower.

Collins skied the race, and fell after the finish while trying to avoid another racer. Collins slid through the netting, and

broke his neck when he hit the tower. Collins brought a personal injury action against Schweitzer and NASTAR in the district court, alleging that Schweitzer was negligent in setting the race course, and NASTAR was vicariously liable for Schweitzer's negligence. Collins also alleged that NASTAR was negligent in its own right for not properly instructing Schweitzer on the setting of the race course, and for not inspecting the course to ensure that it was safe. The district court granted Schweitzer's and NASTAR's motion for summary judgment. Collins appealed.

[1] The Idaho legislature has enacted a law (the Act) which defines the liability of ski area operators and the risks which skiers expressly assume. [2] The Act states that skiers expressly assume the risk of and legal responsibility for injuries resulting from participating in the sport of skiing, including injuries caused by lift towers.

According to the Act's plain language, Collins as a skier expressly assumed the risk of an injury resulting from striking the lift tower, and, therefore, court not recover from Schweitzer for his injury.

[3] Collins argued that the risks of NASTAR racing were not "inherent in the sport of skiing," and, therefore, Schweitzer had a duty to reduce those risks. However, the Act plainly states that "inherent" risks include the risk of injuries caused by lift towers. [4] Under the Act, Schweitzer owed Collins no duty to reduce the risk of his striking and injuring himself on the lift tower. Thus, Collins could not recover from Schweitzer.

[5] Collins also argued that the Act was unconstitutional because it granted blanket immunity to ski area operators, thereby discriminating against skiers in violation of the equal protection of the law. [6] However, the Act passed on the rational relationship test.

[7] Because evidence indicated that Schweitzer assumed full responsibility for racecourse design and layout, and NASTAR never assumed a duty to inspect the course, the district court's grant of summary judgment for NASTAR was also affirmed.

Circuit Judge Leavy dissented, stating that a jury could find that the setting up of the course was not done to eliminate, alter, control, or lessen the inherent risks of skiing. If the jury found that the race course was not set up for that purpose, then, according to the Idaho statutes, Schweitzer had a duty not to negligently cause injury to Collins.

COUNSEL

Hollis H. Barnett, Campbell, Dille & Barnett, Puyallup, Washington, for plaintiffs-appellants.

Peter C. Erbland, Paine, Hamblen, Coffin, Brooke & Miller, Coeur d'Alene, ID,

for defendants-appellees.

OPINION

BRUNETTI, Circuit Judge:

Appellants Michael Collins and his two daughters appeal the district court's grant of appellees' motion for summary judgment. Collins, who became a quadriplegic after falling and breaking his neck on a ski lift tower, brought a diversity action for personal injury based on the alleged negligent operation of the race course by appellees Schweitzer, Inc. and World Wide Ski Corp. We affirm.

I. Facts and Proceedings Below

Appellee Schweitzer, Inc. ("Schweitzer") is an Idaho corporation which operates the Schweitzer Mountain Resort ski area in northern Idaho. Appellee World Wide Ski Corp. ("NASTAR") is a Colorado corporation which promotes amateur ski racing around the country by providing ski areas with a package program for staging races and by keeping a

central database of skier times.

At the time of his accident, Collins was an Idaho resident (though he is now a Washington resident) and an expert skier. He had a season ski pass to the Schweitzer Mountain Resort. He was an experienced amateur racer, having competed in dozens of NASTAR races and been a top-ranked skier in the Northwest in his age group.

On January 31, 1988, Collins skied his last race. Schweitzer had set up a "dual format" slalom racecourse, in which two skiers race side by side. The finish line was approximately 123 feet above and 48 feet to the right (looking down the slope) of a chairlift tower. Schweitzer had placed nylon net fencing in an "S" configuration in front of the tower, and padding two to four inches thick around the base of the tower. Collins skied the course, finished close behind the other racer, and tried to turn right to avoid him. He fell, slid through the netting, and

broke his neck on the tower. He is now a quadriplegic.

Collins brought an action for personal injury and other damages against Schweitzer and NASTAR in the U.S. District Court for the Eastern District of Washington. Collins alleged that Schweitzer was negligent in setting the race course and that NASTAR was vicariously liable for Schweitzer's negligence, and also negligent in its own right for not properly instructing Schweitzer on the setting of race courses and for not inspecting the course to ensure that it was safe. After defendants contested jurisdiction, the court transferred venue to the U.S. District Court for the District of Idaho. Defendants moved for summary judgment, and the district court granted the motion. Collins appeals the grant.

II. Standard of Review

We review the district court's grant of summary judgment de novo. *T.W. Electrical*

Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 629 (9th Cir.1987). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Tzung v. State Farm Fire and Casualty Co.*, 873 F.2d 1338, 1339-40 (9th Cir.1989).

III. Schweitzer

A. Applicability of the Idaho skier statute.

[1] In 1979, the Idaho legislature enacted a law entitled "Responsibilities and Liabilities of Skiers and Ski Area Operators," Idaho Code §§ 6-1101 through 6-1109 (the "Act"). The purpose of the Act is to "define those areas of responsibility and affirmative acts for which ski area operators shall be liable for loss, damage or injury, and to define those risks which the skier expressly assumes and for which there

can be no recovery." Idaho Code § 6-1101 (1990). The Idaho Supreme Court has noted that "in enacting the Act the legislature intended to limit rather than expand the liability of ski area operators." *Northcutt v. Sun Valley Co.*, 117 Idaho 351, 354, 787 P.2d 1159, 1162 (1990).

[2] Under the definitions supplied by the Act, Collins was a "skier" and Schweitzer a "ski area operator."[1] The Act states that "[e]ach skier expressly assumes the risk of and legal responsibility for any injury to person or property which results from participation in the sport of skiing including any injury caused by . . . lift

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[1] The Act defines "skier" as "any person present at a skiing area under the control of a ski area operator for the purpose of engaging in the sport of skiing by utilizing the ski slopes and trails." Idaho Code § 6-1102(6) (1990). The Act defines "ski area operator" as "any person, partnership, corporation or other commercial entity and their agents, officers, employees or representatives, who has operational responsibility for any ski area." Idaho Code § 6-1102(4) (1990).

towers and components thereof." Idaho Code § 6-1106 (1990).[2] According to the plain language of the Act, Collins as a skier expressly assumed the risk of an injury resulting from striking a lift tower, and therefore cannot recover from Schweitzer for his injury.[3]

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[2] Section 6-1106 provides in relevant part:

> Each skier expressly assumes the risk of and legal responsibility for any injury to person or property which results from participation in the sport of skiing including any injury caused by the following, all whether above or below snow surface: variations in terrain; surface or subsurface snow or ice conditions; bare spots, rocks, trees, other forms of forest growth or debris, lift towers and components thereof; utility poles, and snowmaking and snowgrooming equipment which is plainly visible or plainly marked in accordance with the provisions of section 6-1103, Idaho Code. Idaho Code § 6-1106 (1990).

[3] Courts in other jurisdictions considering similar statutes have reached the same conclusion. *See Schmitz v. Cannonsburg Skiing Corp.*, 170 Mich.App. 692, 428 N.W.2d 742, 744 (1988), *appeal denied*, 432 Mich. 856 (1989) (plaintiff skier who struck tree growing on defendant's ski slope expressly assumed the risk of the accident under the

[3] Collins attempts to circumvent this strict risk allocation scheme by contending that the relevant statutory provision is not section 6-1106, but rather section 6-1103, which requires ski area operators to assume a duty "[n]ot to intentionally or negligently cause injury to any person." Idaho Code § 1103(10) (1990).[4] The section provides that

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Michigan skier statute, which provided that skiers assumed the risk of injuries caused by trees); *Berniger v. Meadow Green-Wildcat Corp.*, 945 F.2d 4, 8 (1st Cir.1991) (plaintiff skier who struck some netting on the side of defendant's trail expressly assumed the risk of the accident under the New Hampshire skier statute, which provided that skiers assumed the risks caused by such objects as lift towers, pole lines, and snowmaking equipment).

[4] Section 6-1103 of the Act imposes on ski area operators a catchall duty

> [n]ot to intentionally or negligently cause injury to any person; provided, that except for the duties of the operator set forth in subsections (1) through (9) of this section and in section 6-1104, Idaho Code, the operator shall have no duty to eliminate, alter, control, or lessen the risks inherent in the sport of skiing, which risks include but are not limited to those described in section 6-1106, Idaho Code; and, that no activities undertaken by the operator in

except for nine enumerated duties, a ski area operator "shall have no duty to eliminate, alter, control or lessen the risks inherent in the sport of skiing, which risks include but are not limited to those described in section 6-1106." *Id.* Collins contends that the risks of NASTAR racing are not "inherent in the sport of skiing" and that therefore Schweitzer had a duty to reduce those risks. However, the statute plainly states that "inherent" risks include those listed in section 6-1106, one of which is the risk of injuries caused by lift towers. Section 6-1106 does not distinguish between injuries suffered during racing and injuries suffered during other types of skiing, and there is no legislative history to indicate that the

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> an attempt to eliminate, alter, control or lessen such risks shall be deemed to impose on the operator any duty to accomplish such activities to any standard of care.

Idaho Code § 6-1103(10) (1990).

Idaho legislature intended such a distinction.[5]

[4] Under the Act, then, Schweitzer owed Collins no duty to reduce the risk of his striking and injuring himself on the lift tower. Without a duty there can be no tort and Collins may not recover from Schweitzer. We affirm the district court's grant of summary judgment for Schweitzer.

B. Constitutionality of the Idaho skier statute.

[5] Collins contends that the Act is unconstitutional because it grants blanket immunity to ski area operators but not to other tortfeasors, and consequently "unfairly discriminates against skiers and denies

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[5] The only legislative statements on the record about the Act are a "Statement" that the "purpose of this proposed legislation is to provide definitions, duties and the liability of ski area operators, skiers, tramway operators and passengers" and an estimate that the legislation will have "[n]o fiscal impact." 1979 Idaho Sess.Laws Ch. 270, Statement of Purpose/Fiscal Impact for H.B. 45.

Michael Collins the equal protection of the laws as guaranteed by the Fourteenth Amendment." Brief of Appellants at 27. We review "[h]ealth, safety and economic classifications not based on race or gender . . . at the minimum level of equal protection analysis." *United States v. Garren*, 893 F.2d 208, 210 (9th Cir.1989) (applying the rational relationship test to a statute discriminating between commercial and non-commercial river rafters). The Act establishes such a classification, and therefore we review it under the rational relationship test.[6]

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[6] Every other court that has reviewed an equal protection challenge to a skier statute has used rational basis scrutiny. *See, e.g., Northcutt*, 117 Idaho at 357, 787 P.2d at 1165 (applying rational basis test to Act); *Schmitz*, 428 N.W.2d at 743 (applying rational basis test to Michigan skier statute); *Pizza v. Wolf Creek Ski Dev. Corp.*, 711 P.2d 671, 679 (Colo.1985) (en banc) (applying rational basis test to Colorado skier statute); *Lewis v. Canaan Valley Resorts, Inc.*, 185 W.Va. 684, 408 S.E.2d 634, 643 (1991) (applying rational basis test to West Virginia skier statute).

[6] Under this test, the Act violates Collins' right to equal protection only if it "d[oes] not bear any rational relationship to a legitimate government interest." *Id.* at 210. The government of Idaho clearly has a legitimate interest in promoting the sport of skiing, because the sport "significantly contribut[es] to the economy of Idaho." Idaho Code § 6-1101 (1990). The Act bears a rational relationship to this interest because it clarifies the allocation of risks and responsibilities between ski area operators and skiers.[7] Thus, the Act passes the rational relationship test.

IV. NASTAR

A. Principal/agent relationship with Schweitzer.

Collins' complaint alleged that

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[7] Contrary to Collins' assertion, the statute does not grant "blanket immunity" to ski area operators. *See Northcutt*, 117 Idaho at 357, 787 P.2d at 1165 (identifying those actions for which ski area operators remain liable).

Schweitzer was NASTAR's agent for the purpose of implementing the NASTAR races, and that as the principal, NASTAR was responsible for the negligent acts of Schweitzer. We agree with the district court that the question of whether Collins is NASTAR's agent is moot.

The general rule in Idaho is that "[a] principal is liable for the torts of an agent committed within the scope of the agency relationship." *Sharp v. W.H. Moore, Inc.*, 118 Idaho 297, 303, 796 P.2d 506, 512 (1990). However, we held above that under the Act Schweitzer did not commit a tort because Collins assumed the risk of colliding with a lift tower and Schweitzer had no duty to protect him from such collisions. Because Schweitzer never committed a tort, there is nothing to hold NASTAR liable for even if Schweitzer is NASTAR's agent.[8]

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[8] The non-Idaho cases cited by Collins to support the proposition that an agent's personal immunity from tort liability does not necessarily extend to a principal are

B. General duty of due care.

Collins' complaint alternatively alleged that NASTAR owed a duty to the skiing public to use ordinary care in instructing ski areas on how to set up safe racecourses, and also to inspect those courses to ensure their safety.

[7] The evidence in the record indicates that Schweitzer assumed full responsibility for racecourse design and layout, and that NASTAR never assumed a duty to inspect. Paul Norum, the Schweitzer official responsible for supervising and directing the NASTAR program, stated in his affidavit that

> 4. Schweitzer has always been solely responsible for the placement, location, maintenance, operation and construction of the NASTAR amateur race course. NASTAR is not expected by Schweitzer to provide training supervision or inspection for the

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inapposite; they deal with situations where the agent clearly committed a tort but was immunized from liability, whereas here Schweitzer never committed a tort because Collins assumed the risk of lift tower collisions.

amateur ski racing program. NASTAR does not send representatives to supervise the preparation of, or conduct of, any ski race.

5. Schweitzer had exclusive control of the slopes and trails at Schweitzer, including the NASTAR amateur race course as part of the skiing offered to the public on January 31, 1988.

Merle Frazier, NASTAR's vice president, stated in his affidavit that

4. NASTAR does not construct, supervise, direct or control NASTAR ski racing courses at any ski area, including Schweitzer. NASTAR provides written guidelines for placement of race courses but the location and placement of the course is the responsibility of the ski area. NASTAR does not send representatives to supervise the preparation, or conduct of, any ski race.

The NASTAR manual, cited by Collins as evidence to the contrary, gives only general suggestions for the layout of racecourses, and nowhere states that NASTAR assumes any responsibility to inspect them. Finally, Collins does not allege that NASTAR should be required by law to assume a duty to instruct or inspect. Therefore, we affirm the

district court's grant of summary judgment for NASTAR.

AFFIRMED.

LEAVY, Circuit Judge, dissenting:

Schweitzer contracted with World Wide Ski Corporation to allow Schweitzer to hold NASTAR[1] amateur ski races at its ski resort near Sandpoint, Idaho. Schweitzer employees ran the NASTAR program and set up the course for the race. For several years prior to the accident in question, Schweitzer set the dual format race course[2] with the finish lines in an open area to the right of the lift tower. However, for the race in which the accident happened, Schweitzer placed the finish line

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[1] NASTAR is the acronym for "National Standard Race."

[2] The dual format race involves two courses set side by side and set close to each other with two skiers skiing at the same time. The dual course allows the skier to compete with his own time as well as the other skier.

to the left and above the lift tower.[3] The tower was approximately 125 feet below the finish line. When two skiers were finishing the dual race, the skier on the left would turn to the left, while the skier on the right would turn to the right and be directly uphill from the tower at some point in the turn.

Although the NASTAR regulations

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[3] Collins states:

> On the date of the accident, January 31, 1988, the lower portion of the dual NASTAR slalom race course had been moved from the location where it had historically been located for the past three ski seasons and earlier that ski season. The remaining portion of the ski race course had not been changed. I looked at the course on the way up the hill; however, I presumed the race course was in the same location as in the past and did not notice that the end of the race course was different. The small hut located at the finish line which was used by the Schweitzer employees to time the finish appeared to be located in the same area . . . . There were no signs advising that the run had been changed.

Appellant's Excerpt of Record ("ER") tab 66, para. 8 at 3-4.

specifically warn against the danger of a steep finish,[4] Schweitzer had placed the new finish line in an area where the slope was steeper, rather than flatter, making the right lane even more dangerous with its position above the tower.

Padding on the tower was two to four inches thick and four feet high. This padding was installed on the tower before the race to protect skiers, not necessarily ski racers.

Schweitzer placed net fencing in an "S" pattern immediately above the lift tower. Only ski poles secured the fencing. As described by John Pucci, the Ski Patrol Director at Schweitzer, who has worked on ski

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[4] NASTAR regulations state:

> Make sure that the finish area has a long, level, well marked and fenced off "runout" to avoid collisions. Continually remind racers to move out of the finish area.

ER tab 67, para. 8 at 16 (emphasis added).

patrol for twenty-two years, the efficacy of the netting in stopping a fast-moving skier is questionable:

> Q. Have you seen some skiers slide into [the type of netting used in front of the tower] and slow down?
>
> A. Yes. Well, actually, you know, they're just ski poles stuck in the snow, and if you're going at any high rate of speed, it's not going to slow you down a lot, but it will break the speed somewhat. Eventually, you're going to stop because you're going to have to pull out all these poles. You know what I mean?
>
> If you hit the middle of that fence, say if that fence were stretched all the way out and you hit it, those poles where you impacted are going to pull out of the snow and you're going to pull each one out as you--depending on how fast you were in the slide when you hit that fence. You may pull all the poles out before you stop or you may not, depending on the speed.

ER tab 59 at 9-10.

On the day of the race, the snow was hard-packed, which meant that a fallen skier would slide on the surface rather than sink into the snow and stop.

Collins himself summarized the adverse

conditions that contributed to his accident:

> The area below the finish line was steeper than the finish area itself and was not a long level runout. There was not room for two skiers finishing the race in close proximity to safely ski to the left of the lift tower. Most of the skiers that skied the race would not stop until they had skied below the lift tower that I struck. Snow conditions were such that I continued sliding at a rapid rate of speed on the snow after falling. I hit the web fencing that had been placed above the lift tower; however, the fencing did little to slow my speed, and the fencing wrapped around my body and pulled the ski poles that held the fencing in place out of the snow. I then struck the lift tower with the back of my neck, fracturing my cervical vertebrae and rendering me immediately a quadriplegic.

Id., tab 66 at 5-6.

The majority holds that because Collins was a skier, as defined in Idaho Code § 6-1102(6) (1990), and because he expressly assumed the risks that result from participating in the sport of skiing, defined to include injury caused by a lift tower, he cannot recover.

I.

Idaho legislative policy is clear: 1) It

recognizes that skiing is a hazardous activity even when conducted in the absence of negligence. It defines those risks which the skier expressly assumes as:

> [I]njury to person or property which results from participation in the sport of skiing including any injury caused by the following, all whether above or below snow surface: variations in terrain; surface or subsurface snow or ice conditions; bare spots, rocks, trees, other forms of forest growth or debris, lift towers and components thereof; utility poles, and snowmaking and snowgrooming equipment which is plainly visible or plainly marked in accordance with the provision of section 6-1103, Idaho Code.

Idaho Code § 6-1106.

2) It imposes a duty on the operator "[n]ot to intentionally or negligently cause injury to any person; provided, that except for" certain statutory duties "the operator shall have no duty to eliminate, alter, control or lessen the risks inherent in the sport of skiing, which risks include but are not limited to those described in section 6-1106, Idaho Code." Idaho Code § 6-1103.

3) It absolves an operator from liability provided "that no activities undertaken by the operator in an attempt to eliminate, alter, control or lessen such risks shall be deemed to impose on the operator any duty to accomplish such activities to any standard of care." *Id.*

The Idaho statute expressly requires the skier to assume "the risks inherent in the sport of skiing" but it says nothing about assuming the risk of the operator's negligence in laying out a dangerous race course. The statutory assumption of risk is not a defense to the operator's negligence; rather, by force of the statute a skier assumes risks inherent in the sport of skiing "which are essentially impossible to eliminate by the ski area operation [.]" Idaho Code § 6-1101. Certainly, it was not "essentially impossible to eliminate" the risk of dangerously positioning the finish line of a race course. Therefore, an

operator is not absolved from liability for laying out a course that creates an unreasonable hazard. Here, the operator clearly generated the risk by the placement of a finish line that aimed one of the two racers directly at the tower.

II.

The Idaho Code provides that there is no standard of care, and thus no negligence, if the operator undertakes to diminish any risk inherent in the sport of skiing:

> [T]he operator shall have no duty to eliminate, alter, control or lessen the risks inherent in the sport of skiing, which risks include but are not limited to those described in section 6-1106, Idaho Code; and, that no activities undertaken by the operator in an attempt to eliminate, alter, control or lessen such risks shall be deemed to impose on the operator any duty to accomplish such activities to any standard of care.

Idaho Code § 6-1103(10). However, Idaho Code § 6-1103(10) specifically imposes a duty on the operator "not to intentionally or negligently cause injury to any person[.]" *See Northcutt v. Sun Valley Co.*, 117 Idaho

351, 354-55, 787 P.2d 1159, 1162-63 (1990) ("Without a duty, there can be no negligence.").

In *Northcutt*, the operator attempted to diminish a risk inherent in skiing by posting a warning sign at the confluence of several runs, as required by the statute.[5] Northcutt hit the sign after a collision with another skier. Because the operator was engaged in an activity to fulfill a duty described in section 6-1103, the Idaho Supreme Court held there was no negligence in constructing a sign made from rigid wooden materials rather than materials that would have given way when Northcutt hit it. 117 Idaho at 355, 787 P.2d at 1163.[6]

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[5] Idaho Code § 6-1103(3) requires that the operator "mark conspicuously the top or entrance to each slope or trail or area, with an appropriate symbol for its relative degree of difficulty."

[6] Likewise, two other cases the majority cites, *Schmitz v. Cannonsburg Skiing Corp.*, 170 Mich.App. 692, 428 N.W.2d 742, 744 (1988), *appeal denied*, 432 Mich. 865 (1989) (skier

I do not argue with the proposition that under the Idaho Code, if a skier in the normal course of skiing hits a tower and there is no other issue of the operator's negligence, the operator is not liable. The skier assumes that inherent risk of skiing. I do not believe, however, that the Idaho legislature intended to protect from liability an operator who places the finish line of a race course near an inadequately padded tower, so that ski racers are on a direct course toward the tower on a steep slope with only the flimsiest of nets to protect them. Certainly, the operator had control over where to put the finish line and what kind of net to erect to protect the racers. If the operator acted negligently, the racer did not assume the new risk.

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struck a tree on the ski slope) and *Berniger v. Meadow Green-Wildcat Corp.*, 945 F.2d 4 (1st Cir.1991) (skier struck netting on the side of a trail used to mark hazards), are distinguishable because they involve inherent risks of skiing, not operator negligence.

This position is not inconsistent with *Northcutt*. In *Northcutt*, the Idaho Supreme Court said that the duties enumerated in Idaho Code § 6-1103(1)-(9) and Idaho Code § 6-1104 contained all of the duties of an operator to eliminate, alter, control, or lessen the inherent risks of skiing. Those duties are:

> (1) To mark all trail maintenance vehicles and to furnish such vehicles with flashing or rotating lights which shall be in operation whenever the vehicles are working or are in movement in the skiing area;
>
> (2) To mark with a visible sign or other warning implement the location of any hydrant or similar equipment used in snowmaking operations and located on ski slopes and trails;
>
> (3) To mark conspicuously the top or entrance to each slope or trail or area, with an appropriate symbol for its relative degree of difficulty; and those slopes, trails, or areas which are closed, shall be so marked at the top or entrance;
>
> (4) To maintain one or more trail boards at prominent locations at each ski area displaying that area's network of ski trails and slopes with each trail and slope rated thereon as to it [its] relative degree of difficulty;

(5) To designate by trail board or otherwise which trails or slopes are open or closed;

(6) To place, or cause to be placed, whenever snowgrooming or snowmaking operations are being undertaken upon any trail or slope while such trail or slope is open to the public, a conspicuous notice to that effect at or near the top of such trail or slope;

(7) To post notice of the requirements of this chapter concerning the use of ski retention devices. This obligation shall be the sole requirement imposed upon the ski area operator regarding the requirement for or use of ski retention devices;

(8) To provide a ski patrol with qualifications meeting the standards of the national ski patrol system;

(9) To post a sign at the bottom of all aerial passenger tramways which advises the passengers to seek advice if not familiar with riding the aerial passenger tramway.

Idaho Code § 6-1103(1)-(9).

Every ski area operator shall have the duty to construct, operate, maintain and repair any aerial passenger tramway in accordance with the American national standards safety requirements for aerial passenger tramways.

Idaho Code § 6-1104.

According to the court, not only does

the operator have no other duties to eliminate, alter, control, or lessen the inherent risks of skiing, but if a ski operator undertakes to discharge any of the duties described, it may not be held to be negligent since the operator has no duty to accomplish the activity to any standard of care. *Northcutt*, 117 Idaho at 355, 787 P.2d at 1163.

The court also held that an operator could be negligent and thus liable when engaged in an activity that does not relate to eliminating, altering, controlling, or lessening the inherent risks of skiing: "Construing all the provision of the Act together to give meaning to each portion, we interpret the duty of a ski area operator not to cause injury negligently to refer to that failure to follow . . . any duty that does not relate to eliminating, altering, controlling or lessening the inherent risks of skiing." *Id.*

The negligence complained of here is not that the appellees violated any duty imposed by Idaho Code § 6-1103(1)-(9) or § 6-1104. If activities other than those enumerated in section 6-1103 and section 6-1104 are undertaken, the operator has a duty not to cause injury negligently, unless those activities are undertaken to eliminate, alter, control, or lessen the inherent risks of skiing. Schweitzer was not trying to fulfill a duty imposed by section 6-1103 or section 6-1104 nor do appellants claim that Schweitzer violated any of those statutory duties.[7]

Therefore, there is a material issue of fact as to whether Schweitzer, in setting up the race course, was otherwise attempting to eliminate, alter, control, or lessen the inherent risks of skiing. A jury could find

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[7] The appellees state: "Appellants do not claim that Schweitzer violated any of the duties listed in subsections (1) through (9)." Appellees' Brief at 10.

that the setting up of the course, including the establishment of the location of the finish line and the deployment of a net, was not done to eliminate, alter, control, or lessen the inherent risks of skiing. If a jury found that the race course was not set up for that purpose, then according to the Idaho statutes and *Northcutt*, the ski area operator had a duty not to negligently cause injury to the appellant. I would reverse and remand for trial.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

MICHAEL C. COLLINS, et al., Plaintiffs, v. SCHWEITZER, INC., et al, Defendants.	)	CIVIL NO. 89-3056 **ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

FILED: October 2, 1991

I. FACTS AND PROCEDURE

The above entitled action was brought by Plaintiffs Michael C. Collins, a resident of the State of Washington, and his two daughters, Leslie Collins and Barbara Collins, against Schweitzer, Inc. (Schweitzer), an Idaho corporation, and World Wide Ski Corp., a Colorado corporation doing business as NASTAR, for personal injuries and other damages arising from a skiing accident in which Michael C. Collins was injured at Schweitzer Ski Area near Sandpoint, Idaho, on January 31, 1988.

This suit was originally filed in the United States District Court for the Eastern District of Washington on January 27, 1989. The defendants then contested jurisdiction. Schweitzer moved to dismiss for lack of personal jurisdiction, and NASTAR raised the affirmative defenses of lack of personal jurisdiction and lack of subject matter jurisdiction. After a hearing, the United States District Court for the Eastern District of Washington denied the respective motions and on September 5th, 1989, ordered venue of the case transferred to the District of Idaho.

After transfer of the case to the District of Idaho, the plaintiffs filed an amended complaint naming several new defendants, including defendant Goodwin-Cole, Inc. (Goodwin-Cole), a California corporation. The goal of the amended complaint was to name the manufacturer of the

fence at issue in this case. All of these new defendants, except Goodwin-Cole, were later dismissed by an order dated April 10, 1990.

The facts surrounding the accident, based on the affidavits, depositions and other evidence submitted to the court, are as follows. On January 31, 1988, Plaintiff Michael C. Collins, then a resident of Idaho, was skiing at Schweitzer Mountain Resort operated by Schweitzer in Bonner County, Idaho. After payment of an admission fee, Collins entered into a NASTAR ski race conducted by Schweitzer. After crossing the finish line of the race, Collins fell head first and slid down the hill, through a mesh fence surrounding a lift tower, and struck the lift tower with the back of his neck crushing certain vertebrae, which rendered him a quadriplegic.

Collins was an expert skier and an avid

athlete. He held a season pass at Schweitzer and the 49 Degrees North Ski Area for several years. He took part in 40 to 60 NASTAR races a year at the 49 Degrees North Ski Area from 1979-1983 (for a possible total of 240 races) and continued to ski in NASTAR races after moving to Sandpoint in 1984. His skiing improved to the point that he became one of the top-rated skiers in his age group in the NASTAR program in the Northwest. Nevertheless, he acknowledged in his depositions that he considered NASTAR to be simply a part of recreational skiing and that he competed mostly against his own race times.

NASTAR is a Colorado corporation which engages in the business of promoting ski races by entering into promotional contracts with ski resorts around the country. The races are for amateurs--*anyone* may enter by paying an entrance fee of $4.00--and NASTAR

keeps track of a skier's times so that he can gauge whether his skiing ability is improving. The objectives of NASTAR races are to increase interest in skiing and to provide a means for recreational skiers to improve their skiing ability. Such races are essentially *non-competitive* because the skier's main objective is to improve his own time scores.

Plaintiffs brought suit against Schweitzer for negligence in the setting of the race course, asserting that the ski area set the finish line too close to the lift tower and that they failed to adequately protect the tower with fencing and padding. The lift tower was approximately 123 feet (41 yards) down the slope from the finish line, with the fall line going away from the tower, and approximately 48 feet (16 yards) to the left (looking up the hill) from the finish line. There was a fence placed in front of

the tower in an "S" pattern, and there was padding around the tower.

Plaintiffs brought suit against NASTAR on the basis of vicarious liability, arguing that NASTAR and Schweitzer entered into a contract which created an agency relationship with NASTAR being the principal and Schweitzer the agent. Plaintiffs allege that NASTAR breached a duty to use reasonable care in instructing Schweitzer on the proper manner of setting a race course. Plaintiffs also allege that NASTAR breached a duty to inspect the course to ensure that it complied with industry standards and the standards NASTAR set forth in its operating manual which it supplied to Schweitzer.

Plaintiffs brought suit against Goodwin-Cole for negligence. They claim that Goodwin-Cole sold Schweitzer fence which would not prevent skiers from hitting lift towers, with the knowledge or with reason to

know that Schweitzer would use the fence for that purpose. They also brought suit against Goodwin-Cole for negligence in the design of the fence which Collins slid through before he struck the tower. And, they brought claims for breach of warranties and product liability.

Defendant Goodwin-Cole moved for summary judgment on November 28, 1990. Defendants Schweitzer and NASTAR together moved for summary judgment on December 7, 1990. Plaintiffs responded to these motions on January 31, 1991. On September 4, 1991, the court heard oral argument from all parties on the two motions for summary judgment. Thus, having thoroughly considered all of the arguments presented herein, and based on the analysis to follow, this court finds that the defendants' motions for summary judgment on all claims shall be granted and this action shall be dismissed.

II. ANALYSIS

A. The Summary Judgment Standard

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedures. Rule 56 provides, in pertinent part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." U.S.C.S. Court Rules, Rule 56(c), Federal Rules of Civil Procedure (Law. Co-op 1987).

The Supreme Court has made it clear that under Rule 56 summary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element which is essential to his case and upon which he will bear the burden of proof

at trial. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If the non-moving party fails to make such a showing on any essential element of his case, "there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Id.* at 323.[8]

Moreover, under Rule 56, it is clear that an issue, in order to preclude entry of

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[8] *See also* Rule 56(e), which provides in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

U.S.C.S. Court Rules, Rules of Civil Procedure, Rule 56(e) (Law. Co-op. 1987 & Supp. 1991).

summary judgment, must be *both* "material" and "genuine." An issue is "material" if it affects the outcome of the litigation. An issue, before it may be considered "genuine," must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975) (*quoting* First Nat'l Bank v. Cities Serv. Co., Inc., 391 U.S. 253, 289 (1968)). The Ninth Circuit cases are in accord. *See e.g.*, British Motor Car Distrib. v. San Francisco Automotive Indus. Welfare Fund, 882 F.2d 371 (9th Cir. 1989).

According to the Ninth Circuit, in order to withstand a motion for summary judgment, a party

> (1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of

> either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible.

Id. at 374 (citation omitted).

In analyzing the motions for summary judgment in this case, the claims against Schweitzer and Schweitzer's response will be discussed first. Next, the claims and arguments relating to NASTAR and then Goodwin-Cole will be addressed.

B. Claim Against Schweitzer

1. Does the Idaho statute entitled Responsibilities and Liabilities of Skiers and Ski Area Operators bar Collins from recovering?

As stated above, the plaintiffs brought suit against Schweitzer for negligence in setting up the NASTAR race course, alleging that the finish line was too close to the lift tower struck by Michael Collins and that there was inadequate fencing and padding around the tower. There is a threshold issue

in this case which determines much of the outcome of the motion for summary judgment by Schweitzer and NASTAR. That issue is whether or not the Idaho Responsibilities and Liabilities of Skiers and Ski Area Operators Act (Idaho Code §§ 6-1101 to 6-1109 (1990), the "skier statute" or "Act") applies to shield Schweitzer (an therefore NASTAR) from liability.

Section 6-1101 states that the legislative purpose of the Act was "to define those areas of responsibility and affirmative acts for which ski area operators shall be liable for loss, damage or injury, and *to define those risks which the skier expressly assumes and for which there can be no recovery.*" *Id.* (emphasis added). The Act was passed in 1979 in an attempt to protect ski areas from potentially overwhelming liability from ski accidents. The legislature acknowledged the popularity of

the sport both with Idahoans and the large number of people from out of state who ski here. The legislature also noted that the sport of skiing contributes significantly to the economy of Idaho.

Section 6-1103 spells out ten duties imposed upon ski area operators such as Schweitzer. The first nine of these duties deal with such things as the duty to mark trail maintenance vehicles and the location of snowmaking equipment; post the degree of difficulty of the various slopes; make known which slopes are closed and which are open; furnish a ski patrol, etc. Then the tenth duty (Section 6-1103(10)) is a sort of catch-all duty which all of the defendants contend means one thing and the plaintiffs argue means another. Because it is so important to this case, Section 6-1103(10) is given here in its entirety:

> Every ski area operator shall have the following duties with respect to their

operation of a skiing area:

* * * *

(10) Not to intentionally or negligently cause injury to any person; provided, that *except* for the duties of the operator set forth in subsections (1) through (9) of this section and in section 6-1104, Idaho Code, [which deals with the duty to maintain ski lifts], the operator shall have *no duty* to eliminate, alter, control or lessen the risks inherent in the sport of skiing, which risks include but are not limited to those described in section 6-1106, Idaho Code; and, that *no activities* undertaken by the operator in an attempt to eliminate, alter, control or lessen such risks *shall be deemed to impose on the operator any duty to accomplish such activities to any standard of care.*

Idaho Code § 6-1103 (1990) (emphasis added).

Then Section 6-1106 spells out the duties of skiers:

It is recognized that skiing as a recreational sport is hazardous to skiers, regardless of all feasible safety measures which can be taken.

Each skier *expressly assumes the risk of and legal responsibility for* any injury to person or property which results from participation in the sport of skiing *including any injury caused by the following,* all whether above or below snow surface: variations in terrain; surface or subsurface snow or

> ice conditions; bare spots, rocks, trees, other forms of forest growth or debris;-*lift towers and components thereof;* utility poles, and snowmaking and snowgrooming equipment which is plainly visible or plainly marked . . . . Therefore, *each skier shall have the sole individual responsibility for knowing the range of his own ability to negotiate any slope or trail, and it shall be the duty of each skier to ski within the limits of the skier's own ability, to maintain reasonable control of speed and course at all times while skiing* . . . .

Idaho Code § 6-1106 (1990) (emphasis added).

There has been one reported Idaho case interpreting this statute, Northcutt v. Sun Valley Co., 117 Idaho 351, 787 P.2d 1159 (1990). In this case the Idaho Supreme Court established that the statutory scheme works in the following manner. The court first cited the key language in Section 6-1103(10): "[N]o activities undertaken by the operator in an attempt to eliminate, alter, control or lessen such risks shall be deemed to impose on the operator any duty to accomplish such activities to any standard of

care." Northcutt at 354. The court then held that the specific ski area duties set forth in Section 6-1103 and Section 6-1104 are duties to eliminate, alter, control or lessen the inherent risks of skiing. *Id.* Then the court declared that the cited portion of the statute means that a ski area operator has *no other duties* to eliminate or lessen the inherent risks of skiing. *Id.* And finally, the court held that the last clause of Section 6-1103(10) *eliminates any standard of care* for a ski area operator in carrying out *any of the duties* described in Section 6-1103 and Section 6-1104. *Id.* at 355.

The court then interpreted the duty of the ski area operator not to cause injury negligently to refer to first *the failure to follow whatsoever* the duties specified in Sections 6-1103 and 6-1104, and second to any duty *that does not relate* to eliminating,

altering, controlling or lessening the inherent risks of skiing.

The practical effect of the court's decision in Northcutt is that the duties described in Sections 6-1103 and 6-1104 are the *only* duties a ski area operator has with respect to the inherent risks of skiing and even anything an operator does to fulfill those duties *cannot be held to be negligence* because the operator had no duty to accomplish the activity to any standard of care. *Id.* In addition, anything else a ski area operator does to attempt to lessen the inherent risks of skiing *cannot* result in liability for negligence for that action. *Id.*

According to Sections 6-1103 and 6-1106, injury resulting from a *ski lift tower* is specifically listed as an inherent risk of skiing. Therefore, under Section 6-1106, anyone who strikes a ski lift tower while

skiing is considered to have expressly assumed the risk and legal responsibility for any injury which results. In addition, under Section 6-1103(10), anything a ski area operator does not eliminate, alter, control or lessen the risks associated with lift towers--such as placing a fence around a tower or padding it--could not result in the operator being held liable for negligence.

Therefore, it is clear that if Collins had simply been skiing down the run and struck the tower, he could not recover. Yet the question is whether the fact that Schweitzer had set up a NASTAR race course and Collins was injured while he was racing on the course changes things so that the statute does not shield Schweitzer from liability.

Plaintiffs argue that the statute and Northcutt do not shield Schweitzer from liability because in setting up the course

Schweitzer was not engaged in nor was the activity related to eliminating, altering, controlling or lessening the inherent risks of skiing. Rather, they maintain that Schweitzer increased the risks of skiing. They point out that when not racing one is free to choose how fast to go and how close to come to lift towers. On the other hand, racing encourages the skier to go as fast as possible and forces him to ski where the course goes.

The plaintiffs next argue that assumption of the risk is no longer a defense in Idaho after Salinas v. Vierstra, 107 Idaho 984, 695 P.2d 369 (1985), in which the Idaho Supreme Court declared that Idaho's comparative negligence statute, Idaho Code § 6-801 (1971), prevented assumption of the risk from being a bar to recovery. However, the Idaho legislature, in enacting Section 6-1101, et seq., the skier statute, declared as

public policy that assumption of the risk is a defense for claims based on the inherent risks of skiing. The specific statute controls.[9]

Schweitzer argues that the Act does apply to the facts of this case. It assets that hitting a lift tower is an inherent risk of skiing and the fact that it occurred in the context of a NASTAR race should not affect the application of the statute. In addition, Schweitzer has presented evidence that its employees carefully planned the layout and location of the course in an attempt to eliminate or lessen the risks.

Despite the terrible tragedy suffered by Mr. Collins and his family, they are barred from recovering by operation of the Idaho skier statute. Under the Act, anything done in an attempt to eliminate or lessen the

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[9] *See, for example,* Farmers Nat'l Bank v. Wickham Pipeline Constr., 114 Idaho 565, 759 P.2d 71 (1988).

inherent risks of skiing cannot serve as the basis for a claim of negligence. In addition, hitting a lift tower is an inherent risk of skiing which the statute states all skiers expressly assume and for which they are barred from recovering.

In the opinion of this court, the fact that the injury occurred in the context of a NASTAR race does not change the application of the statute. NASTAR races are for recreational skiers--anyone may enter. The entrance fee is only $4.00. The races are essentially non-competitive--the racer is trying to improve his own skiing time. The plaintiffs' argument that the statute does not shield Schweitzer from liability because the injury occurred in the context of a NASTAR race is also weakened by the fact that the entire left side of the race course was lined by trees. Collins could have gone off the left side of the course at any time and

hit a tree, which is another statutory inherent risk of skiing. Would Collins then claim that Schweitzer was negligent for having a NASTAR ski race near trees?

NASTAR races are held by many ski areas and are designed to enhance the skiing experience for recreational skiers. Setting up a NASTAR course is a normal part of running a ski area. Thus, anything a ski area does to eliminate or lessen the inherent risks of skiing in connection with setting up the race course or protecting skiers from hazardous obstacles *cannot* be the basis of liability for negligence. Under the statute, anything a ski area operator does to lessen the inherent risks of skiing does *not* impose any duty to accomplish such activity to any standard of care.

There are no genuine issues of material fact in plaintiffs' claim against Schweitzer for negligence. The facts are not disputed.

This case turns on the correct interpretation of the Idaho statute. Under the Idaho skier statute, no standard of care can be imposed upon a ski area operator with respect to any action it takes in an attempt to eliminate, alter, control or lessen the inherent risks of skiing. Therefore, Schweitzer owed no duty to Collins with respect to the actions it took in carefully planning the location and layout of the race course or in fencing and padding the lift tower. It is axiomatic that where there is no duty, there can be no negligence. Consequently, the plaintiffs have failed to make a showing sufficient to establish the existence of two essential elements of their cause of action--duty and breach--and upon which they would have the burden of proof at trial. Summary judgment on this claim is therefore appropriate. Celotex Corp. v. Catrett, 477 U.S. at 322.

2. Constitutionality of the Idaho

statute.

Plaintiffs have also challenged the Idaho statute on the grounds that it violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article 1, section 2 of the Idaho Constitution. The plaintiffs argue that the statute unfairly singles out skiers and subjects them to unequal treatment in light of the fact that participants in other sports with inherent risks are not similarly barred from recovering.

The Idaho Supreme Court addressed this issue in Northcutt. The court held that the statute does not violate the Fourteenth Amendment or the Idaho Constitution because it is rationally related to a legitimate government interest--skiing is a popular sport which contributes significantly to the economy of Idaho and should therefore be encouraged and protected. The rational

relationship test is the appropriate test to be applied to this statute, and the Idaho court's decision is correct.

In reviewing a statute to determine if it violates the Equal Protection Clause of the Fourteenth Amendment, there are three levels of scrutiny. Determining the proper degree of judicial scrutiny is a function of two variables: the nature of the right affected, and the identity of the person asserting equal protection rights.

The first level is *strict scrutiny*, in which the court will treat as presumptively invidious those classifications that disadvantage a "suspect class," or impinge upon the exercise of a "fundamental right."[10] Such classifications will only be upheld if the classification has been precisely tailored to serve a compelling

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[10] Plyer v. Doe, 457 U.S. 202, 216-17 (1982).

governmental interest.[11]

Intermediate scrutiny is the next level of judicial review, which is generally used to determine the validity of laws that classify according to gender and certain other criteria.[12] A law will be struck down under intermediate scrutiny unless it can be shown that it is substantially related to achievement of an important governmental purpose.[13] Mere administrative ease and convenience are not sufficiently important objectives to justify classifications

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[11] *Id.* at 217. *See also* Trimble v. Gordon, 430 U.S. 762 (1977); San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, *reh'g denied*, 411 U.S. 959 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).

[12] *See* Levy v. Louisiana, 391 U.S. 68 (1068) (illegitimacy); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (illegitimacy); Lalli v. Lalli, 439 U.S. 259 (1978) (illegitimacy); Craig v. Boren, 429 U.S. 190 (1976) (gender).

[13] Craig v. Boren, 429 U.S. 190, 197 (1976).

subjected to intermediate scrutiny.[14]

Lastly, the lowest level of scrutiny is the *rational basis* test. This test requires merely that the statute classify the persons it affects in a manner rationally related to legitimate government objectives.[15]

The classification in the Idaho skier statute is not based upon a suspect classification or fundamental right or one of the criteria to be reviewed under intermediate scrutiny. In addition, the court will assume that the objectives of a statute articulated by the legislature are the actual purpose, unless it is shown that the circumstances indicate otherwise.[16] The

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[14] *See* Stanley v. Illinois, 405 U.S. 645, 656 (1972); Frontiero v. Richardson, 411 U.S. 677, 690 (1973).

[15] *See* United States v. Kinsey, 843 F.2d 383, 393-94 (9th Cir.), *cert. denied*, 488 U.S. 836 (1988).

[16] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

purpose of the Idaho skier statute is to protect and promote an important state industry. Health, safety, and economic classifications not based on race or gender are reviewed at the minimum level of equal protection analysis.[17]

Therefore, in the case at hand the proper test is the rational basis test and the statute here would only violate Collins' right to equal protection if it did not bear any rational relationship to a legitimate government interest. Protection and enhancement of an important state industry is a legitimate government interest, and this court holds that the statute is rationally related to that interest. It is true that skiers who are injured must bear the burden of this statute, yet because the statute is rationally related to a legitimate government

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[17] *See* United States v. Garren, 893 F.2d 208 (9th Cir. 1989).

interest, this court will not substitute its own judgment for that of the legislature. The United States Supreme Court adopted this position in Schweiker v. Wilson, 450 U.S. 221 (1981):

> The Court has said that, although this rational-basis standard is "not a toothless one," Mathews v. Lucas, 427 U.S. 495, 510 . . . (1976), it does not allow us to substitute our personal notions of good public policy for those of Congress:
>
> > "In the area of economics and social welfare, a State does not violate the Equal Protection Clause [and correspondingly the Federal Government does not violate the equal protection component of the Fifth Amendment] merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification '*is not made with mathematical nicety or because in practice it results in some inequity.*' Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)." Dandridge v. Williams, 397 U.S. at 485 . . . .
>
> The court has also said: "This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that

> create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 . . . (1976). See also United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166 . . . (1980). As long as the classificatory scheme chosen by Congress rationally advances a reasonable and identifiable governmental objective, we must disregard the existence of other methods of allocation that we, as individuals, perhaps would have preferred.

Id. at 234-35 (emphasis added) (citations omitted).

3. Effect of the release signed by Collins.

It should also be noted that Collins signed a release of liability when he registered for the NASTAR race in which he was injured. The release was on the NASTAR registration form which Collins prepared at his home prior to the start of the ski season. The release was in fine print. The text of the release reads as follows:

I hereby give NASTAR permission to use

> my photo for the promotion of NASTAR and NASTAR programs. I hereby release the sponsoring ski areas, their members or agents, and any person officially connected with this competition *from all liabilities, for any injury or damages whatsoever* arising from my participation or presence at a NASTAR-sanctioned competition.

See Exhibit A attached to Affidavit of Hollis Barnett in Opposition to Defendant Schweitzer, World Wide Ski Corp and Goodwin Cole Inc. Motion for Summary Judgment, filed January 31, 1991 (emphasis added).

Plaintiffs argue that the release is not enforceable because the duty not to negligently cause harm (Section 6-1103(10)) is a "public duty" that cannot be varied by agreement. This argument succeeds only if the plaintiffs' interpretation of the statute as applied to these facts is followed, i.e., Schweitzer's actions in setting up the race course and taking steps to protect skiers from hitting the lift tower are not related to eliminating or lessening the inherent

risks of skiing.

Schweitzer argues that the release was binding on Collins and cites Lee v. Sun Valley Co., 107 Idaho 976, 695 P.2d 361 (1984). In that case, the plaintiff signed a horseback riding rental agreement with the Sun Valley Co., a licensed outfitter and guide. Plaintiff was then injured. Outfitters' duties are also governed by statute,[18] and the court held that the release in the rental agreement was effective except to the extent that it purported to relieve the outfitter from meeting its "public" duties specified in the statute.

> [W]here the legislature has addressed the rights and duties pertaining to personal injuries arising out of the relationship between two groups, *i.e.*, employers/employees, outfitters and guides/participants, and has granted limited liability to one group in exchange for adherence to specific duties, then such duties become a "public duty" within the exception to the general rule validating exculpatory

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[18] *See* Idaho Code § 6-1201, et seq.

> contracts. Therefore, while the agreement between Sun Valley and plaintiff does absolve Sun Valley from common law liabilities, it does not absolve Sun Valley from liability for possible violation of the public duty imposed by I.C. § 6-1204.

Id. at 979.

If Schweitzer failed to meet a public duty under the statute, the release would not shield it from liability for that breach. Yet it does not appear that Schweitzer has breached a public duty because to do that would require it to either: (1) fail to do anything whatsoever to fulfill the duties specified in the statute, or (2) to have acted in some way that does *not* relate to eliminating, altering, controlling, or lessening the inherent risks of skiing.

If the setting up of a NASTAR race course were held to take this case outside of the statute because it does not relate to eliminating, etc., the inherent risks of skiing, and Schweitzer were found to be

negligent, then the release would not shield Schweitzer from liability under Section 6-1103(10). Yet, this court concludes that setting up a NASTAR race course is a normal part of running a ski area for recreational skiing. Therefore, under the statute, Schweitzer's carefully planning the layout and location of the course and fencing and padding the tower are deemed to be related to eliminating, altering, controlling or lessening the inherent risks of skiing. In addition, under the statute Collins is held to have assumed the risk of hitting the lift tower. Consequently, Schweitzer is shielded from liability under *both* the statute and the release because Schweitzer has not breached a public duty.

The court also notes that the Wyoming Supreme Court, in Milligan v. Big Valley Corp., 754 P.2d 1063 (Wyo. 1988), held that the release signed by a contestant in an

ironman triathlon at Grand Targhee Ski Resort barred recovery after he was later killed while skiing in the competition.

In addition, Collins was very involved with amateur athletics in Sandpoint. He founded, organized and directed several amateur competitions, such as bicycle races and running races. According to Collins, these competitions always employed standard release forms, and Collins admits that he was aware of these and understood their purpose.

C. Claim against World Wide Ski Corp. dba NASTAR

1. NASTAR'S liability for the negligence of Schweitzer.

The plaintiffs are suing NASTAR on the basis of vicarious liability pursuant to the principal-agent relationship which they allege existed between NASTAR and Schweitzer. The plaintiffs argue that the contract between Schweitzer and NASTAR created the agency because in the contract NASTAR

reserved the right to control Schweitzer.[19] Schweitzer and NASTAR have presented evidence which shows that Schweitzer was solely responsible for conducting the NASTAR race program as Schweitzer, that no NASTAR representatives ever even visited Schweitzer, and that all decisions regarding course layout and location were made solely by Schweitzer employees.

The plaintiffs rely on Herbst v. Bothof Dairies, Inc., 110 Idaho 971 P.2d 1231 (Ct App. 1986), which states that a principal's liability for the actions of an agent is based on the *right to control* rather than the actual exercise of control over an agent's

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[19] The pertinent portions of paragraph one of the contract read as follows: "NASTAR retains total authority over the NASTAR program . . . and reserves the right to exclude results deemed invalid, set the rules of the competition, award rights to commercial sponsors, and set and maintain standards for the conduct of NASTAR races." Affidavit of Paul Norum, filed Dec. 7, 1990, Exhibit A at 1 ¶ 1.

actions in the scope of the agency. Nevertheless, the issue of agency is moot because of the conclusion that Schweitzer cannot be held negligent since it did not violate a duty (given the provisions of the skier statute). Consequently, NASTAR cannot be liable either, because a principal cannot be held liable for the negligence of an agent when that agent has been held *not* negligent as a matter of law.

The effect of vicarious liability or respondeat superior is that a principal can be held liable for the negligence of an agent acting within the scope of the agency, even though the principal himself is not negligent and even if he did everything in his power to prevent it. *See* W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 69 at 499 (5th ed. 1984). Nevertheless, the foundation of the action is still negligence, or other fault, on the part of the agent, and

the ordinary rules of negligence are still applied to it. *Id.* Therefore, if the agent is found to be not negligent, then the principal cannot be held vicariously liable to the plaintiff because there is no negligence for which to be held vicariously liable. For these reasons, summary judgment on plaintiffs' claim against NASTAR based on vicarious liability is also appropriate.

2. The effect of the release on NASTAR's liability.

NASTAR asserts that the release shields it from liability; yet the plaintiffs maintain that because the release does not specifically name NASTAR, it cannot be protected by the release.

The release was in the NASTAR registration form. Therefore, it presumably was prepared by NASTAR. According to Idaho law, a release is to be strictly construed against the party who prepared it. *See*

Anderson & Nafziger v. G.T. Newcomb, Inc., 100 Idaho 175, 178, 595 P.2d 709, 712 (1979). Nevertheless, it is unnecessary to delve into the question of the release with respect to NASTAR's liability given the conclusion that NASTAR cannot be held vicariously liable because its alleged agent, Schweitzer, has been held to be not negligent as a matter of law.

3. NASTAR'S duty to inspect.

The plaintiffs also argue that NASTAR breached a duty to inspect the race course. The affidavits and depositions submitted by Schweitzer indicate that Schweitzer was solely responsible for the layout and location of the race course--all of the decisions were made by Schweitzer employees. According to the affidavit submitted by an officer of NASTAR, the ski area alone is responsible for the setting of a NASTAR race course. Plaintiffs' claim against NASTAR for

failure to inspect the course is based on the premise that Schweitzer was negligent in setting the course. Again, this claim is precluded by the decision that Schweitzer cannot be found negligent due to the Idaho skier statute. The liability of NASTAR cannot be premised on the fact that Schweitzer was negligent in setting the course, because Schweitzer has been found to be not negligent as a matter of law.

D. Claims against Goodwin-Cole

The plaintiffs make various claims against Goodwin-Cole based on its sale of fence to Schweitzer. They claim that the fence collins slid through before he struck the lift tower was sold by Goodwin-Cole to Schweitzer. To successfully assert any claim against Goodwin-Cole based upon the fence in questions, the plaintiffs must come forward with sufficient evidence that it was fence sold by Goodwin-Cole which *caused* the

injuries of Mr. Collins. *See* Mico Mobile Sales & Leasing, Inc. v. Skyline Corp., 97 Idaho 408, 546 P.2d 54 (1975); Challis Irrig. Company v. State, 107 Idaho 338, 689 P.2d 230 (Ct. App. 1984); Idaho Pattern Jury Instruction No. 230 (1988 ed.); Menne v. Celotex Corp., 861 F.2d 1453 (10th Cir. 1988). The plaintiffs must show that Mr. Collins' injuries would not have occurred but for the failure of Goodwin-Cole's fence.

Yet the plaintiffs have failed to show what type of fence Collins slid through or who sold it to Schweitzer. They have presented almost no evidence on this issue. With respect to Goodwin-Cole, plaintiffs can show that at some time a few years before the accident Goodwin-Cole did sell some fence to Schweitzer. Yet, after extensive discovery, all plaintiffs really have with respect to whose fence was involved in the accident is the answer to one question in their third set

of interrogatories in which the general manager of Schweitzer says he "believes" that the fence came from Goodwin-Cole. On the other hand, the plaintiffs constantly refer to the fence as "pop fencing," which is distributed by one of Goodwin-Cole's competitors. None of the other Schweitzer employees seems to know what fence was used or who sold it to Schweitzer. One thought it was made by "Fall Line," a brand of fence Goodwin-Cole does not sell. The others were simply unsure.

On this limited evidence, the plaintiffs' claim cannot survive the motion for summary judgment by Goodwin-Cole. As noted by Goodwin-Cole, the United States Supreme Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) held:

> Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would

> warrant the jury to find a verdict in favor of that party. Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, *but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.* (Footnotes omitted).

Id. at 251 (*quoting* Improvement Co. v. Munson, 14 Wall 442, 448, 20 L. Ed. 867 (1872).

As noted above, under Rule 56 summary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element which is essential to its case and upon which it will bear the burden of proof at trial. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Because the plaintiffs here have failed to make an adequate showing as to the type of fence Collins slid through or the

manufacturer or seller of that fence, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Id.* at 323. Therefore, Goodwin-Cole is entitled to a judgment as a matter of law.

1. Claim of negligent design of fence.

Based on the affidavits, exhibits, depositions and oral argument offered to the court, it is clear that Goodwin-Cole does not *manufacture* any fence; it is simply a distributor. The fences it sold to Schweitzer were manufactured by a company by the name of ADIC Safety Designs and Supplies, Inc. The fences were shipped by the manufacturer in sealed individual packages and remained sealed until delivered to Schweitzer. Goodwin-Cole took no part in the design or manufacture of the fence it sold to

Schweitzer.

Idaho Code § [6-1407(1)] 6-1307(1) (1990) provides:

> In the absence of express warranties to the contrary, product sellers *other than manufacturers* shall *not be subject to liability* in circumstances where they do not have a reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, reveal the existence of the defective condition which is in issue; or *where the product seller acquires the product in a sealed package or container and sells the product in the same sealed package or container.*

(emphasis added).

This provision shields Goodwin-Cole from liability because it delivered the fences it sold to Schweitzer in sealed containers which had never been opened. It is not necessary to go on to address whether Goodwin-Cole could be liable for failure to inspect and to warn because it knew or had reason to know of a defect in the fence, because the plaintiffs have failed to provide any meaningful evidence whatsoever with regard to the type

of fence involved or who sold it to Schweitzer.

3. Claim for breach of warranty.

According to the evidence offered by Goodwin-Cole, it sold Schweitzer "slope edging nets" for the purpose of marking ski trails, boundaries, and lift lines and to direct skier traffic. These nets or fences were not sold to be used to protect skiers from fixed objects. Goodwin-Cole sells a different, stronger type of fence designed for that purpose. Goodwin-Cole, therefore, argues that when it sold the "slope edging nets" to Schweitzer they were fit for ordinary use and fit for the particular purpose for which they were purchased. Goodwin-Cole denies that any express warranties were made to Schweitzer regarding the "slope edging nets."

The plaintiffs acknowledge that they have no evidence of any express warranties

regarding the nets/fences. In addition, the plaintiffs do not have any evidence showing that the fences were sold for the purpose of protecting skiers from fixed objects like lift towers. Consequently, summary judgment is appropriate with respect to the claim for breach of warranties, and the plaintiffs acknowledge this in their memorandum.

III. CONCLUSION

Based on the foregoing, summary judgment will be granted for *all* defendants. The Idaho skier statute bars the plaintiffs from recovering from Schweitzer. With respect to the release signed by Mr. Collins, this court finds that Schweitzer has not breached a public duty. Therefore, *both* the statute and the release shield Schweitzer from liability.

Because Schweitzer is entitled to summary judgment, the court holds that NASTAR is also entitled to summary judgment. NASTAR cannot be vicariously liable for the

negligent acts of Schweitzer if, as a matter of law, Schweitzer was not negligent.

Lastly, Goodwin-Cole is entitled to summary judgment because the plaintiffs have failed to come forward with sufficient evidence to justify the case going to a jury on the issue of causation. The plaintiffs have no hard evidence as to what type of fence Collins slid through or where it came from. All they have is the naked belief of one of Schweitzer's employees. A jury would be engaged in sheer speculation as to the manufacturer and seller of the fence in question.

IV. ORDER

Based on the foregoing and the court being fully advised in the premises,

IT IS HEREBY ORDERED that the Motion for Summary Judgment by Defendants Schweitzer and NASTAR should be, and is hereby, GRANTED.

IT IS FURTHER ORDERED that the Motion

for Summary Judgment by Defendant Goodwin-Cole should be, and is hereby, GRANTED, and this action shall be DISMISSED.

DATED this 2nd day of October, 1991.

HAROLD L. RYAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

MICHAEL C. COLLINS, LESLIE COLLINS, and BARBARA COLLINS,	)	
Plaintiffs,	)	CIVIL NO. 89-3056
v.	)	JUDGMENT
SCHWEITZER, INC., a corporation, WORLD WIDE SKI CORP dba NASTAR, a corporation; and GOODWIN-COLE, INC., a corporation,	)	
Defendants.	)	

FILED: October 2, 1991

Based upon this court's Order Granting Defendants' Motions for Summary Judgment, dated October 2nd, 1991, and the court being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that plaintiffs take nothing against the defendants, and that this action be

dismissed.

DATED this 2nd day of October, 1991.

HAROLD L. RYAN
UNITED STATES DISTRICT JUDGE

JUDGMENT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL C. COLLINS, LESLIE COLLINS, MARK VOVOS, as guardian ad litem for BARBARA COLLINS	No. 91-36183 D.C. No. CV-89-3056-HLR
	ORDER
Plainitffs-Appellants	
vs.	
SCHWEITZER, INC., WORLD WIDE SKI CORP., dba NASTAR RIBLET TRAMWAY COMPANY,	
Defendants-Appellees.	

FILED: June 23, 1994

Before: BRUNETTI, LEAVY, and TROTT, Circuit Judges

Judge Brunetti and Judge Trott have voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. Judge Leavy has voted to grant the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on

the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

ALASKA STATUTES

Title 9. Code of Civil Procedure.

Chapter 65. Miscellaneous Provisions.

Section 09.65.135 Limitations on claims arising from skiing.

(a) A skier may not recover from a ski area operator for injury resulting from an inherent risk of skiing unless the injury occurred when the ski area operator was not providing the information required by (b) of this section.

(b) A ski area operator shall post trail signs at prominent locations within a ski area which shall include a list of the inherent risks of skiing and the limitation on liability of the ski area operator provided by this section.

(c) In this section

(1) "inherent risks of skiing" means the danger or conditions which are an integral part of the sport of skiing, including, but not limited to,

(A) changing weather conditions;

(B) variations or steepness in terrain;

(C) snow or ice conditions;

(D) surface or subsurface conditions such as bare spots, forest growth, and rocks;

(E) collisions with lift towers, other structures, and their components unless the skier is on the lift;

(F) collisions with other skiers; and

(G) a skier's failure to ski within the limits of the skier's ability;

(2) "injury" means a personal injury or property damage or loss;

(3) "skier" means a person in a ski area engaged in the sport of skiing, sliding downhill on snow or ice on skis, a toboggan, a sled, a tube, a ski-bob, or other device for recreation in snow;

(4) "ski area" means all ski slopes, trails and other places under the control of a ski area operator and administered as a single enterprise in the state;

(5) "ski area operator" means the operator of a ski area.

COLORADO REVISED STATUTES ANNOTATED

Section 33-44-109. Duties of skiers--penalties

(1) Each skier solely has the responsibility for knowing the range of his own ability to negotiate any ski slope or trail and to ski within the limits of such ability. Each skier expressly accepts and assumes the risk of and all legal responsibility for any injury to person or property resulting from any of the inherent dangers and risks of skiing; except that a skier is not precluded under this article from suing another skier for any injury to person or property resulting from such other skier's acts or omissions. Notwithstanding any provision of law or statute to the contrary, the risk of a skier/skier collision is neither an inherent risk nor a risk assumed by a skier in an action by one skier against another.

(2) Each skier has the duty to maintain

control of his speed and course at all times when skiing and to maintain a proper lookout so as to be able to avoid other skiers and objects. However, the primary duty shall be on the person skiing downhill to avoid collision with any person or objects below him.

IDAHO CODE

CHAPTER 11. RESPONSIBILITIES AND LIABILITIES OF SKIERS AND SKI AREA OPERATORS

6-1101. Legislative purpose. The legislature finds that the sport of skiing is practiced by a large number of citizens of this state and also attracts a large number of nonresidents, significantly contributing to the economy of Idaho. Since it is recognized that there are inherent risks in the sport of skiing which should be understood by each skier and which are essentially impossible to eliminate by the ski area operation, it is the purpose of this chapter to define those areas of responsibility and affirmative acts for which ski area operators shall be liable for loss, damage or injury, and to define those risks which the skier expressly assumes and for which there can be no recovery.

6-1102. Definitions. The following words and phrases when used in this chapter shall have, unless the context clearly indicates

otherwise, the meanings given to them in this section.

(1) "Aerial passenger tramway" means any device operated by a ski area operator used to transport passengers, by single or double reversible tramway; chair lift or gondola lift; T-bar lift, J-bar lift, platter lift or similar device; or a fiber rope tow, which is subject to regulations adopted by the proper authority.

(2) "Passenger" means any person who is lawfully using an aerial passenger tramway, or is waiting to embark or has recently disembarked from an aerial passenger tramway and is in its immediate vicinity.

(3) "Ski area" means the property owned or leased and under the control of the ski area operator within the state of Idaho.

(4) "Ski area operator" means any person, partnership, corporation or other commercial entity and their agents, officers, employees or representatives, who has

operational responsibility for any ski area or aerial passenger tramway.

(5) "Skiing area" means all designated slopes and trails but excludes any aerial passenger tramway.

(6) "Skier" means any person present at a skiing area under the control of a ski area operator for the purpose of engaging in the sport of skiing by utilizing the ski slopes and trails and does not include the use of an aerial passenger tramway.

(7) "Ski slopes and trails" means those areas designated by the ski area operator to be used by skiers for the purpose of participating in the sport of skiing.

6-1103. Duties of ski area operators with respect to ski areas. Every ski area operator shall have the following duties with respect to their operation of a skiing area:

(1) To mark all trail maintenance vehicles and to furnish such vehicles with flashing or rotating lights which shall be in

operation whenever the vehicles are working or are in movement in the skiing area;

(2) To mark with a visible sign or other warning implement the location of any hydrant or similar equipment used in snowmaking operations and located on ski slopes and trails;

(3) To mark conspicuously the top or entrance to each slope or trail or area, with an appropriate symbol for its relative degree of difficulty; and those slopes, trails, or areas which are closed, shall be so marked at the top or entrance;

(4) To maintain one or more trail boards at prominent locations at each ski area displaying that area's network of ski trails and slopes with each trail and slope rated thereon as to it [its] relative degree of difficulty;

(5) To designate by trail board or otherwise which trails or slopes are open or closed;

(6) To place, or cause to be placed, whenever snowgrooming or snowmaking operations are being undertaken upon any trail or slope while such trail or slope is open to the public, a conspicuous notice to that effect at or near the top of such trail or slope;

(7) To post notice of the requirements of this chapter concerning the use of ski retention devices. This obligation shall be the sole requirement imposed upon the ski area operator regarding the requirement for or use of ski retention devices;

(8) To provide a ski patrol with qualifications meeting the standards of the national ski patrol system;

(9) To post a sign at the bottom of all aerial passenger tramways which advises the passengers to seek advice if not familiar with riding the aerial passenger tramway; and

(10) Not to intentionally or negligently cause injury to any person; provided, that

except for the duties of the operator set forth in subsections (1) through (9) of this section and in section 6-1104, Idaho Code, the operator shall have no duty to eliminate, alter, control or lessen the risks inherent in the sport of skiing, which risks include but are not limited to those described in section 6-1106, Idaho Code; and, that no activities undertaken by the operator in an attempt to eliminate, alter, control or lessen such risks shall be deemed to impose on the operator any duty to accomplish such activities to any standard of care.

[Compiler's Notes. The bracketed word "its" in subsection (4) was inserted by the compiler.]

6-1104. Duties of ski area operators with respect to aerial passenger tramways. Every ski area operator shall have the duty to construct, operate, maintain and repair any aerial passenger tramway in accordance with the American national standards safety

requirements for aerial passenger tramways.

6-1105 Duties of passengers. Every passenger shall have the duty not to:

(1) Board or embark upon or disembark from an aerial passenger tramway except at an area designated for such purpose;

(2) Drop, throw or expel any object from an aerial passenger tramway;

(3) Do any act which shall interfere with the running or operation of an aerial passenger tramway;

(4) Use any aerial passenger tramway if the passenger does not have the ability to use it safely without instruction until the passenger has requested and received sufficient instruction to permit safe usage;

(5) Embark on an aerial passenger tramway without the authority of the ski area operator;

(6) Use any aerial passenger tramway without engaging such safety or restraining devices as may be provided.

6-1106. Duties of skiers. It is recognized that skiing as a recreational sport is hazardous to skiers, regardless of all feasible safety measures which can be taken.

Each skier expressly assumes the risk of and legal responsibility for any injury to person or property which results from participation in the sport of skiing including any injury caused by the following, all whether above or below snow surface: variations in terrain; surface or subsurface snow or ice conditions; bare spots, rocks, trees, other forms of forest growth or debris, lift towers and components thereof; utility poles, and snowmaking and snowgrooming equipment which is plainly visible or plainly marked in accordance with the provisions of section 6-1103, Idaho Code. Therefore, each skier shall have the sole individual responsibility for knowing the range of his own ability to negotiate any slope or trail, and it shall be the duty of

each skier to ski within the limits of the skier's own ability, to maintain reasonable control of speed and course at all times while skiing, to heed all posted warnings, to ski only on a skiing area designated by the ski area operator and to refrain from acting in a manner which may cause or contribute to the injury of anyone. The responsibility for collisions by any skier while actually skiing, with any person, shall be solely that of the individual or individuals involved in such collision and not that of the ski area operator.

No person shall place any object in the skiing area or on the uphill track of any aerial passenger tramway which may cause a passenger or skier to fall; cross the track of any T-bar lift, J-bar lift, platter lift or similar device, or a fiber rope tow, except at a designated location; or depart when involved in a skiing accident, from the scene of the accident without leaving

personal identification, including name and address, before notifying the proper authorities or obtaining assistance when that person knows that any other person involved in the accident is in need of medical or other assistance.

No skier shall fail to wear retention straps or other devices to help prevent runaway skis.

6-1107 Liability of ski area operators.

Any ski area operator shall be liable for loss or damages caused by its failure to follow the duties set forth in sections 6-1103 and 6-1104, Idaho Code, where the violation of duty is causally related to the loss or damage suffered. The ski area operators shall not be liable to any passenger or skier acting in violation of their duties as set forth in sections 6-1105 and 6-1106, Idaho Code, where the violation of duty is causally related to the loss or damage suffered; nor shall a ski area

operator be liable for any injury or damage to a person who is not legally entitled to be in the ski area; or for any loss or damages caused by any object dropped, thrown or expelled by a passenger from an aerial passenger tramway.

6-1108 Liability of passengers.

Any passenger shall be liable for loss or damages resulting from violations of the duties set forth in section 6-1105, Idaho Code, and shall not be able to recover from the ski area operator for any losses or damages where the violation of duty is causally related to the loss or damage suffered.

6-1109. Liability of skiers. Any skier shall be liable for loss or damages resulting from violations of the duties set forth in section 6-1106, Idaho Code, and shall not be able to recover from the ski area operator for any losses or damages where the violation of duty is causally related to the loss or damage

suffered.

MAINE REVISED STATUTES ANNOTATED

Section 488. Skiers' and tramway passengers' responsibilities

It is hereby recognized that skiing as a recreational sport and the use of passenger tramways associated therewith may be hazardous to skiers or passengers, regardless of all feasible safety measures which can be taken. Therefore, each skier shall have the sole responsibility for knowing the range of his own ability to negotiate any slope or ski trail, and it shall be the duty of each skier to conduct himself within the limits of his own ability, to maintain control of his speed and course at all times while skiing, to heed all posted warnings and to refrain from acting in a manner which may cause or contribute to the injury of himself or others. Except as otherwise specifically provided in this subchapter, each skier who participates in the sport of skiing shall be deemed to have assumed the risk of the

dangers inherent in the sport and assumed the legal responsibility for any injury to his person or property arising out of his participation in the sport of skiing, unless the injury or death was actually caused by the negligent operation or maintenance of the ski area by the ski area operator, its agents or employees. Except as provided in this section, the responsibility for collisions by any skier while actually skiing, with any person or object, shall be solely that of the skier or skiers involved in collision and not that of the ski area operator. This section shall not prevent the maintenance of an action against a ski area operator for the negligent design, construction, operation or maintenance of a tramway.

MASSACHUSETTS GENERAL LAWS ANNOTATED

Section 710. Duties of skiers. Provides in part as follows:

A skier shall maintain control of his speed and course at all times, and shall stay clear of any snow- grooming equipment, any vehicle, towers, poles, or other equipment.

A skier skiing down hill shall have the duty to avoid any collision with any other skier, person or object on the hill below him, and, except as otherwise provided in this chapter, the responsibility for collisions by any skier with any other skier or person shall be solely that of the skier or person involved and not that of the operator, and the responsibility for the collision with any obstruction, man-made or otherwise, shall be solely that of the skier and not that of the operator, provided that such obstruction is properly marked pursuant to the regulations promulgated by the board. No skier shall ski on any ski slope or trail

or portion thereof which has been designated closed, nor ski on other than an identified trail, slope or ski area. Any person skiing on other than an open slope or trail within the ski area shall be responsible for any injuries resulting from his action. A skier shall be presumed to know the range of his own ability to ski on any slope, trail or area. A skier shall be presumed to know of the existence of certain unavoidable risks inherent in the sport of skiing, which shall include, but not be limited to, variations in terrain, surface or subsurface snow, ice conditions or bare spots, and shall assume the risk of injury or loss caused by such inherent risks.

408.342. Ski areas; conduct of skiers; acceptance of risks

Sec. 22. (1) While in a ski area, each skier shall do all of the following:

(a) Maintain reasonable control of his or her speed and course at all times.

(b) Stay clear of snow-grooming vehicles and equipment in the ski area.

(c) Heed all posted signs and warnings.

(d) Ski only in ski areas which are marked as open for skiing on the trail board described in section 6a(e). [FN1]

(2) Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions; bare spots; rocks, trees, and other forms of natural growth or debris; collisions with

ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment.

23-2-731. Purpose.

The legislature finds that skiing is a major recreational sport and a major industry in the state and recognizes that among the attractions of the sport are risks, inherent and otherwise. The state has a legitimate interest in maintaining the economic viability of the ski industry by discouraging claims based on damages resulting from risks inherent in the sport, defining inherent risks, and establishing the duties of skiers and ski area operators.

23-2-736. Skier's conduct -- inherent risks.

(1) A skier has the duty to conduct himself at all times so that he avoids injury to himself and others and to be aware of the inherent risks of the sport.

(2) A skier:

(a) must know the range of his ability and safely conduct himself within the limits of that ability and his equipment so as to

negotiate any section of terrain or ski trail safely and without injury or damage. A skier must know that his ability may vary because of trail changes caused by weather, grooming changes, or skier use.

(b) shall maintain control of speed and course so as to prevent injury to himself or others;

(c) must abide by the requirements of the skier responsibility code that is published by the national ski areas association and that is current on April 4, 1989; and

(d) shall obey all posted or other warnings and instructions of the ski area operator.

(3) A person may not:

(a) place an object in the ski area or on the uphill track of a passenger tramway that may cause a passenger or skier to fall;

(b) cross the track of a passenger tramway except at a designated and approved

point; or

(c) if involved in a skiing accident, depart from the scene of the accident without:

(i) leaving personal identification; or

(ii) notifying the proper authorities and obtaining assistance when he knows that a person involved in the accident is in need of medical or other assistance.

(4) A skier must accept all legal responsibility for injury or damage of any kind to the extent that the injury or damage results from risks inherent in the sport of skiing. Risks inherent in the sport of skiing are:

(a) variations in skiing terrain, including surface and subsurface snow or ice conditions naturally occurring or resulting from weather changes, skier use, or grooming or snowmaking operations;

(b) bare spots and thin snow cover caused by limited snowfall, melting, wind

erosion, skier action, grooming, or unconsolidated base;

(c) forest growth on designated trails;

(d) skiing in an area not designated as a ski trail;

(e) clearly visible or plainly marked improvements or equipment;

(f) clearly visible or plainly marked mobile equipment and attachments, whether moving or stationary, used by the ski area operator; and

(g) avalanches, except on open, designated ski trails.

NEW HAMPSHIRE STATUTES ANNOTATED

Section 225-A:24. Responsibilities of Skiers and Passengers

It is hereby recognized that, regardless of all safety measures which may be taken by the ski area operator, skiing as a sport and the use of passenger tramways associated therewith may be hazardous to the skiers or passengers. Therefore:

I. Each person who participates in the sport of skiing accepts as a matter of law, the dangers inherent in the sport, and to that extent may not maintain an action against the operator for any injuries which result from such inherent risks, dangers, or hazards. The categories of such risks, hazards or dangers which the skier or passenger assumes as a matter of law include but are not limited to the following: variations in terrain, surface or subsurface snow or ice conditions; bare spots; rocks, trees, stumps and other forms of forest

growth or debris; lift towers and components thereof (all of the foregoing whether above or below snow surface); pole lines and plainly marked or visible snow making equipment; collisions with other skiers or other persons or with any of the categories included in this paragraph.

II. Each skier and passenger shall have the sole responsibility for knowing the range of his own ability to negotiate any slope, trail or passenger tramway. Any passenger who boards such tramway shall be presumed to have sufficient abilities to negotiate the lift, and no liability shall attach to any operator or attendant for failure to instruct persons on the use thereof.

III. Each skier or passenger shall conduct himself within the limits of his own ability, maintain control of his speed and course at all times while skiing, heed all posted warnings and refrain from acting in a manner which may cause or contribute to the

injury of himself or others.

IV. Each passenger shall be the sole judge of his ability to negotiate any uphill track, and no action shall be maintained against any operator by reason of the condition of said track unless the board, upon appropriate evidence furnished to it, makes a finding that the condition of the track, at the time and place of an accident, did not meet the board's requirements, provided however, that the ski area operator shall have had notice, prior to the accident, of the board's requirements the violation of which is claimed to be the basis for any action by the passenger.

V. No skier, passenger or other person shall:

(a) Embark or disembark upon a passenger tramway except at designated areas.

(b) Throw or drop any object while riding on a passenger tramway nor do any act or thing which shall interfere with the

running of said tramway.

(c) Engage in any type of conduct which will contribute to cause injury to any other person nor shall he willfully place any object in the uphill ski track which may cause another to fall, while riding in a passenger tramway.

(d) Ski or otherwise use a slope or trail which has been designated "closed" by the operator without written permission of said operator or designee.

(e) Remove, alter, deface or destroy any sign or notice placed in the ski area or on the trail board by the operator.

(f) Cross the uphill track of a J bar, T bar, rope tow, wire rope, or similar device except at locations approved by the board.

Section 5:13-5. Assumption of risk of skier

A skier is deemed to have knowledge of and to assume the inherent risks of skiing, operating toboggans, sleds or similar vehicles created by weather conditions, conditions of snow, trails, slopes, other skiers, and all other inherent conditions. Each skier is assumed to know the range of his ability, and it shall be the duty of each skier to conduct himself within the limits of such ability, to maintain control of his speed and course at all times while skiing, to heed all posted warnings and to refrain from acting to a manner which may cause or contribute to the injury of himself or others.

Section 5:13-6. Application of law on comparative negligence

The assumption of risk set forth in section 5 shall be a complete bar of suit and shall serve as a complete defense to a suit

against an operator by a skier for injuries resulting from the assumed risks, notwithstanding the provisions of P.L.1973, c. 146 (C. 2A:15-5.1 et seq.), relating to comparative negligence, unless an operator has violated his duties or responsibilities under this act, in which case the provisions of P.L.1973, c. 146 shall apply. Failure to adhere to the duties set out in sections 4 and 5 shall bar suit against an operator to compensate for injuries resulting from skiing activities, where such failure is found to be a contributory factor in the resulting injury, unless the operator has violated his duties or responsibilities under the act, in which case the provisions of P.L.1973, c. 146 shall apply.

NEW MEXICO STATUTES 1978, ANNOTATED

Section 24-15-10 Duties of the skiers.

A. It is recognized that skiing as a recreational sport is inherently hazardous to skiers, and it is the duty of each skier to conduct himself carefully.

B. A person who takes part in the sport of skiing accepts as a matter of law the dangers inherent in that sport insofar as they are obvious and necessary. Each skier expressly assumes the risk of and legal responsibility for any injury to person or property which results from participation in the sport of skiing, in the skiing areas, including any injury caused by the following: variations in terrain; surface or subsurface snow or ice conditions; bare spots, rocks, trees or other forms of forest growth or debris; lift towers and components thereof, pole lines, and snow-making equipment which are plainly visible or are plainly marked in accordance with the provisions of Section 24-

15-7 NMSA 1978; except for any injuries to persons or property resulting from any breach of duty imposed upon ski area operators under the provisions of Sections 24-15-7 and 24-15-8 NMSA 1978. Therefore, each skier shall have the sole individual responsibility for knowing the range of his own ability to negotiate any slope or trail, and it shall be the duty of each skier to ski within the limits of the skier's own ability, to maintain reasonable control of speed and course at all times while skiing, to heed all posted warnings, to ski only on a skiing area designated by the ski area operator and to refrain from acting in a manner which may cause or contribute to the injury of anyone. The responsibility for collisions by any skier while actually skiing, with any person or object, shall be solely that of the individual or individuals involved in such collision, except where the ski area operator is involved in such collision or where such

collision resulted from any breach of duty imposed upon the ski area operator under the provisions of Sections 24-15-7 and 24-15-8 NMSA 1978.

C. No person shall:

(1) place any object in the skiing area or on the uphill track of any ski lift which may cause a passenger or skier to fall;

(2) cross the track of any T-bar lift, J-bar lift, platter lift or similar device or a fiber rope tow, except at a designated location;

(3) when injured while skiing or using a ski lift or, while skiing, when involved in a collision with any skier or object in which an injury results, leave the ski area before giving his name and current address to the ski area operator, or representative or employee of the ski area operator and the location where the injury or collision occurred and the circumstances thereof; provided, however, in the event a skier fails

to give the notice required by this paragraph, a court, in determining whether or not such failure constitutes a violation of the Ski Safety Act [this article], may consider the reasonableness or feasibility of giving such notice; or

(4) use a ski lift while intoxicated or under the influence of any controlled substance.

D. No skier shall fail to wear retention straps or other devices to help prevent runaway skis.

E. Any skier upon being injured shall indicate, to the ski patrol personnel offering first aid treatment or emergency removal to a first aid room, his acceptance or rejection of such services as provided by the ski area operator. If such service is not refused or if the skier is unable to indicate his acceptance or rejection of such service, the acceptance of the service is presumed to have been accepted by the skier. Such

acceptance shall not constitute a waiver of any action for negligent provision of the service by the ski patrol personnel.

MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK

Section 18-105. Duties of skiers

All skiers shall have the following duties:

1. Not to ski in any area not designated for skiing;

2. Not to ski beyond their limits or ability to overcome variations in slope, trail configuration and surface or subsurface conditions which may be caused or altered by weather, slope or trail maintenance work by the ski area operator, or skier use;

3. To abide by the directions of the ski area operator;

4. To remain in constant control of speed and course at all times while skiing so as to avoid contact with plainly visible or clearly marked obstacles and with other skiers and passengers on surface operating tramways;

5. To familiarize themselves with posted information before skiing any slope or trail,

including all information posted pursuant to subdivision five of section 18-103 of this article;

6. Not to cross the uphill track of any surface lift, except at points clearly designated by the ski area operator;

7. Not to ski on a slope or trail or portion thereof that has been designated as "closed" by the ski area operator;

8. Not to leave the scene of any accident resulting in personal injury to another party until such times as the ski area operator arrives, except for the purpose of summoning aid;

9. Not to overtake another skier in such a manner as to cause contact with the skier being overtaken and to yield the right-of-way to the skier being overtaken;

10. Not to willfully stop on any slope or trail where such stopping is likely to cause a collision with other skiers or vehicles;

11. To yield to other skiers when entering a trail or starting downhill;

12. To wear retention straps or other devices to prevent runaway skis;

13. To report any personal injury to the ski area operator before leaving the ski area; and

14. Not to willfully remove, deface, alter or otherwise damage signage, warning devices or implements, or other safety devices placed and maintained by the ski area operator pursuant to the requirements of section 18-103 of this article.

Section 18-106 Duties of skiers and ski area operators with respect to inherent risks

It is recognized that skiing is a voluntary activity that may be hazardous regardless of all feasible safety measures that can be undertaken by ski area operators. Accordingly:

1. Ski area operators shall have the following additional duties:

a. To post at every point of sale or distribution of lift tickets, whether on or off the premises of the ski area operator, a conspicuous "Warning to Skiers" relative to the inherent risks of skiing in accordance with regulations promulgated by the commissioner of labor pursuant to subdivision four of section eight hundred sixty-seven of the labor law, and to imprint upon all lift tickets sold or distributed, such t ext and graphics as the commissioner of labor shall similarly specify, which shall conspicuously direct the attention of all skiers to the required "Warning to Skiers";

b. To post at every point of sale or distribution of lift tickets at a ski area notice to skiers and passengers that this article prescribes certain duties for skiers, passengers and ski area operators, and to make copies of this article in its entirety available without charge upon request to skiers and passengers in a central location

at the ski area;

c. To make available at reasonable fees, as required by subdivision thirteen of section 18-103 of this article, instruction and education for skiers relative to the risks inherent in the sport and the duties prescribed for skiers by this article, and to conspicuously post notice of the time and places of availability of such insurance and education in locations where it is likely to be seen by skiers; and

d. To post notice to skiers of the right to a refund to the purchaser in the form and amount paid in the initial sale of any lift ticket returned to the ski area operator, intact and unused, upon declaration by such purchaser that he or she is unprepared or unwilling to ski due to the risks inherent in the sport or the duties imposed upon his or her by this article.

2. Skiers shall have the following additional duties to enable them to make

informed decisions as to the advisability of their participation in the sport:

a. To seek out, read, review and understand, in advance of skiing, a "Warning to Skiers" as shall be defined pursuant to subdivision five of section eight hundred sixty-seven of the labor law, which shall be display ed and provided pursuant to paragraph a of subdivision one of this section; and

b. To obtain such education in the sport of skiing as the individual skier shall deem appropriate to his or her level of ability, including the familiarization with skills and duties necessary to reduce the risk of injury in such sport.

53-09-06 Duties of skiers.

It is recognized that skiing as a recreational sport is hazardous to skiers, regardless of all feasible safety measures which can be taken. Each skier expressly assumes the risk of and legal responsibility for any injury to person or property which results from participation in the sport of skiing including any injury caused by the following: variations in terrain; surface or subsurface snow or ice conditions; bare spots, rocks, trees, or other forms of forest growth or debris, lift towers and components thereof; pole lines; and snowmaking equipment which are plainly visible or are plainly marked in accordance with the provisions of section 53-09-03. Therefore, each skier shall have the sole individual responsibility for knowing the range of his own ability to negotiate any slope, trail, or aerial passenger tramway, and it is the duty of each

skier to ski within the limits of the skier's own ability, to make reasonable control of speed and course at all times while skiing, to heed all posted warnings, to ski only on a skiing area designated by the ski area operator, and to refrain from acting in a manner which may cause or contribute to the injury of anyone. The responsibility for collisions by any skier while actually skiing, with any person or object, is solely that of the individual or individuals involved in such collision and not that of the ski area operator. No person may:

1. Unless authorized by the ski area operator, place any object in the skiing area or on the uphill track of any aerial passenger tramway which may cause a passenger or skier to fall.

2. Cross the track of a t-bar lift, j-bar lift, platter lift or similar device, or a fiber rope tow except at a designated location.

3. Fail to wear retention straps or other devices to help prevent runaway skis.

30.970. Definitions for ORS 30.970 to 30.990.

As used in ORS 30.970 to 30.990:

(1) "Inherent risks of skiing" includes, but is not limited to, those dangers or conditions which are an integral part of the sport, such as changing weather conditions, variations or steepness in terrain, snow or ice conditions, surface or subsurface conditions, bare spots, creeks and gullies, forest growth, rocks, stumps, lift towers and other structures and their components, collisions with other skiers and a skier's failure to ski within the skier's own ability.

(2) "Injury" means any personal injury or property damage or loss.

(3) "Skier" means any person who is in a ski area for the purpose of engaging in the sport of skiing or who rides as a passenger on any ski lift device.

(4) "Ski area" means any area designated

and maintained by a ski area operator for skiing.

(5) "Ski area operator" means those persons, and their agents, officers, employees or representatives, who operate a ski area.

30.975 Skiers assume certain risks

In accordance with ORS 18.470 and notwithstanding ORS 18.475 (2), an individual who engages in the sport of skiing, apline or nordic, accepts and assumes the inherent risks of skiing in so far as they are reasonably obvious, expected or necessary.

Section 7102. Comparative negligence

(a) General rule.--In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

(b) Recovery against joint defendant; contribution.--Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal

negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution.

(c) Downhill skiing.--

(1) The General Assembly finds that the sport of downhill skiing is practiced by a large number of citizens of this Commonwealth and also attracts to this Commonwealth large numbers of nonresidents significantly contributing to the economy of this Commonwealth. It is recognized that as in some other sports, there are inherent risks in the sport of downhill skiing.

(2) The doctrine of voluntary assumption of risk as it applies to downhill skiing injuries and damages is not modified by

subsections (a) and (b).

(d) Definitions.--As used in this section the following words and phrases shall have the meanings given to them in this subsection:

"Defendant or defendants against whom recovery is sought." Includes impleaded defendants.

"Plaintiff." Includes counterclaimants and cross-claimants.

68-114-103 Responsibility of skier and passenger.

It is hereby recognized that Alpine or downhill skiing as a recreational sport and the use of passenger tramways associated therewith may be hazardous to skiers or passengers, regardless of all feasible safety measures which can be taken. Therefore, each skier and each passenger has the sole responsibility for knowing the range of such skier's or passenger's own ability to negotiate any slope, ski trail or associated passenger tramway, and it is the duty of each skier and passenger to conduct such skier or passenger within the limits of such skier's or passenger's own ability, to maintain control of such skier's or passenger's speed and course at all times while skiing, to heed all posted warnings and to refrain from acting in a manner which may cause or contribute to the injury of such skier or

passenger or others. Except as otherwise specifically provided in this chapter, each skier or passenger is deemed to have assumed the risk of and legal responsibility for any injury to such skier's or passenger's person or property arising out of such skier's or passenger's participation in Alpine or downhill skiing or the use of any passenger tramways associated therewith. The responsibility for collisions by any skier while actually skiing, with any person or object, shall be solely that of the skier or skiers involved in such collision and not that of the ski area operator.

UTAH CODE, 1953

78-27-51 Inherent risks of skiing -- Public policy.

The Legislature finds that the sport of skiing is practiced by a large number of residents of Utah and attracts a large number of nonresidents, significantly contributing to the economy of this state. It further finds that few insurance carriers are willing to provide liability insurance protection to ski area operators and that the premiums charged by those carriers have risen sharply in recent years due to confusion as to whether a skier assumes the risks inherent in the sport of skiing. It is the purpose of this act, therefore, to clarify the law in relation to skiing injuries and the risks inherent in that sport, to establish as a matter of law that certain risks are inherent in that sport, and to provide that, as a matter of public policy, no person engaged in that sport shall recover from a ski operator

for injuries resulting from those inherent risks.

78-27-52 Inherent risks of skiing -- Definitions.

As used in this act:

(1) "Inherent risks of skiing" means those dangers or conditions which are an integral part of the sports of skiing, snowboarding, and ski jumping, including, but not limited to: changing weather conditions, variations or steepness in terrain; snow or ice conditions; surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, impact with lift towers and other structures and their components; collisions with other skiers; and a skier's failure to ski or jump within the skier's own ability.

(2) "Injury" means any personal injury or property damage or loss.

(3) "Skier" means any person present in a ski area for the purpose of engaging in the

sport of skiing, nordic, freestyle, or other types of ski jumping, and snowboarding.

(4) "Ski area" means any area designated by a ski area operator to be used for skiing, nordic, freestyle, or other type of ski jumping, and snowboarding.

(5) "Ski area operator" means those persons, and their agents, officers, employees or representatives, who operate a ski area.

78-27-53 Inherent risks of skiing -- Bar against claim or recovery from operator for injury from risks inherent in sport.

Notwithstanding anything in Sections 78-27-37 through 78-27-43 to the contrary, no skier may make any claim against, or recover from, any ski area operator for injury resulting from any of the inherent risks of skiing.

Section 1037. Acceptance of inherent risks

Notwithstanding the provisions of section 1036 of this title, a person who takes part in any sport accepts as a matter of law the dangers that inhere therein insofar as they are obvious and necessary.

70.117.020. Standard of conduct--Prohibited acts--Responsibility

(1) In addition to the specific requirements of this section, all skiers shall conduct themselves within the limits of their individual ability and shall not act in a manner that may contribute to the injury of themselves or any other person.

(2) No person shall:

(a) Embark or disembark upon a ski lift except at a designated area;

(b) Throw or expel any object from any tramway, ski lift, commercial skimobile, or other similar device while riding on the device;

(c) Act in any manner while riding on a rope tow, wire rope tow, j-bar, t-bar, ski lift, or similar device that may interfere with the proper or safe operation of the lift or tow;

(d) Wilfully engage in any type of conduct

which may injure any person, or place any object in the uphill ski track which may cause another to fall, while traveling uphill on a ski lift; or

(e) Cross the uphill track of a j-bar, t-bar, rope tow, wire rope tow, or other similar device except at designated locations.

(3) Every person shall maintain control of his or her speed and course at all times, and shall stay clear of any snow grooming equipment, any vehicle, any lift tower, and any other equipment on the mountain.

(4) A person shall be the sole judge of his or her ability to negotiate any trail, run, or uphill track and no action shall be maintained against any operator by reason of the condition of the track, trail, or run unless the condition results from the negligence of the operator.

(5) Any person who boards a rope tow, wire rope tow, j-bar, t-bar, ski lift, or other

similar device shall be presumed to have sufficient abilities to use the device. No liability shall attach to any operator or attendant for failure to instruct the person on the use of the device, but a person shall follow any written or verbal instructions that are given regarding the use.

(6) Because of the inherent risks in the sport of skiing all persons using the ski hill shall exercise reasonable care for their own safety. However, the primary duty shall be on the person skiing downhill to avoid any collision with any person or object below him or her.

(7) Any person skiing outside the confines of trails open for skiing or runs open for skiing within the ski area boundary shall be responsible for any injuries or losses resulting from his or her action.

(8) Any person on foot or on any type of sliding device shall be responsible for any collision whether the collision is with

another person or with an object.

(9) A person embarking on a lift or tow without authority shall be considered to be a trespasser.

Section 20-3A-5 Duties of skiers.

It is recognized that skiing as a recreational sport is hazardous to skiers, regardless of all feasible safety measures which can be taken.

Each skier expressly assumes the risk of and legal responsibility for any injury, loss or damage to person or property which results from participation in the sport of skiing including, but not limited to, any injury, loss or damage caused by the following: Variations in terrain; surface or subsurface snow or ice conditions; bare spots, rocks, trees, other forms of forest growth or debris; collisions with pole lines, lift towers or any component thereof; or, collisions with snow-making equipment which is marked by a visible sign or other warning implement in compliance with section three [s 20-3A-3] of this article. Each skier shall have the sole individual responsibility for

knowing the range of his own ability to negotiate any slope or trail, and it shall be the duty of each skier to ski within the limits of the skier's own ability, to maintain reasonable control of speed and course at all times while skiing, to heed all posted warnings, to ski only on a skiing area designated by the ski area operator and to refrain from acting in a manner which may cause or contribute to the injury of anyone. If while actually skiing, any skier collides with any object or person, except an obviously intoxicated person of whom the ski area operator is aware, the responsibility for such collision shall be solely that of the skier or skiers involved and not that of the ski area operator.

No person shall place any object in the skiing area or on the uphill track or on any aerial passenger tramway which may cause a passenger or skier to fall; or which crosses the track of any T-bar lift, J-bar lift,

platter lift or similar device, or a fiber rope tow except at a designated location; nor shall any person involved in a skiing accident depart the ski area without leaving personal identification, including name and address, or without notifying the proper authorities or without obtaining assistance when that person knows or reasonably should know that any other person involved in the accident is in need of medical or other assistance. No skier shall fail to wear retention straps or other devices to help prevent runaway skis.

Supreme Court, U.S.
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No. 94-382

In The

Supreme Court of the United States

October Term, 1994

MICHAEL C. COLLINS, LESLIE COLLINS, and BARBARA COLLINS,

Petitioners,

v.

SCHWEITZER, INC., and WORLD WIDE SKI CORP dba NASTAR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING A WRIT

This is a diversity of citizenship case, the outcome of which is governed by Idaho law. Petitioner, Michael Collins injured himself while skiing at Schweitzer Mountain Resort in Idaho.[1] An accomplished and experienced ski racer, Collins struck a chairlift tower after completing an amateur ski race.

The applicable substantive law is an Idaho statute passed in 1979 entitled: "Responsibilities and Liabilities of Skiers and Ski Area Operators," Idaho Code §§6-1101 through 6-1109 (the "Act"). The court of appeals relied upon an interpretation of the Act by the Idaho Supreme Court in *Northcutt v. Sun Valley*, 117 Idaho 351, 787 P.2d 1159 (1990).

No issue of national importance is raised by the petition. No conflicts between the circuits exists or is even asserted. Other state courts of last resort have construed their own skiing responsibility statutes. But, because each state's statute has unique language it would be wrong to assert that there are conflicts among these state courts of last resort.

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[1] Neither Schweitzer, Inc. nor World Wide Ski Corp. (NASTAR) have parent companies, subsidiaries or affiliates that have issued shares to the public.

II. THE IDAHO SKIER STATUTE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Petitioners contend that the Act is unconstitutional because it is not rationally related to its stated purpose and denies all skiers the equal protection of the laws. Petitioners go so far as to argue that the Act grants "blanket immunity" to ski area operators and "effectively precludes liability on any basis for a ski area operator." (Pet. pp. 13, 20). The court of appeals rejected petitioners' argument, finding specifically that the Act does not grant "blanket immunity" to ski area operators. *Collins v. Schweitzer*, 21 F.3d 1491, 1494 n.7 (9th Cir. 1994).

The decision of the court of appeals is correct. The Act was passed in recognition of the fact that there are inherent risks in the sport of skiing which should be understood by each skier and which are essentially impossible to eliminate. The purpose of the statute is to define the areas of responsibility and affirmative acts for which ski area operators shall be liable and to define those risks which the skier expressly assumes and for which there can be no recovery. Idaho Code §6-1101.

Idaho Code §§6-1103 and 6-1104 define areas of responsibility for ski area operators which are all related to safety of the skiing public.[2] Idaho Code §6-1103(10)

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[2] Those specific duties consist of marking trail maintenance vehicles and furnishing them with flashing or rotating lights; marking snowmaking equipment located on slopes and trails; marking the entrance to each slope or trail with a symbol for its relative degree of difficulty and marking closed trails or slopes; maintaining trail boards at prominent locations describing the network and relative degree of difficulty of ski trails and

creates a duty for the ski area operator "not to intentionally or negligently cause injury to any person." It also provides that, except for the duties described above, the operator shall have no duty to eliminate, alter, control or lessen the risks inherent in sport of skiing and that no activities undertaken by the operator in an attempt to eliminate, alter, control or lessen such risks shall be deemed to impose on the operator any duty to accomplish such activities to any standard of care. *Id.*

It is true that the Act places the duty upon each skier to ski within the limits of his ability and to maintain reasonable control of speed and course. Idaho Code §6-1106. The Act also requires a skier to assume the risk of and legal responsibility for injury caused by variation in terrain, snow conditions and lift towers. *Id.*

The Idaho Legislature did not mandate that a ski area operator prevent all injuries to skiers. An injured claimant might wish to argue that the terrain should have been smoother, that surface snow or ice should have been broken up and groomed, that bare spots should have been covered, that rocks, trees and other forms of forest growth should have been removed, that lift towers were inappropriately placed in relationship to trails or amateur race courses, etc. However, such arguments are contrary

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whether they are open or closed; placing a conspicuous notice at the top of the trail or slope whenever snowgrooming or snowmaking operations are being undertaken; posting notices of the requirements of the law regarding ski retention devices; providing a qualified ski patrol; posting signs for skiers advising them to seek advice regarding aerial passenger tramways and complying with certain standards regarding tramways. Idaho Code §§6-1103 and 6-1104.

to the plain language and clear meaning of the Act, which, among other things, places the duty to avoid collisions with lift towers upon the skier.

The Idaho Legislature has a legitimate interest in promoting the sport of skiing because it significantly contributes to the economy of Idaho. Idaho Code §6-1101. There is a rational relationship between this legitimate governmental objective and the allocation of risks and responsibilities between ski area operators and skiers. The Idaho Supreme Court has rejected an equal protection challenge to the Act, finding that it is rationally related to a legitimate government interest. *Northcutt v. Sun Valley*, 117 Idaho 351, 356-358, 787 P.2d 1159, 1164-1165.

Equal protection challenges have been made to skiing responsibility acts in other jurisdictions but almost all have been rejected using a rational basis scrutiny. *Pizza v. Wolf Creek Ski Development Corp.*, 711 P.2d 671, 679 (Colo. 1985) (en banc) (act imposes rebuttable presumption that responsibility for collisions by skiers with any person, natural object, or man made structure marked in accordance with act is solely that of skier(s) involved and not that of ski area operator; skier fell and collided into slope, due to variation in terrain); *Schmitz v. Cannonsburg Skiing Corp.*, 170 Mich. App. 692, 694, 428 N.W.2d 742, 743 (1988) (skier collided with tree on slope), *appeal denied*, 432 Mich. 856 (1989); *Grieb v. Alpine Valley Ski Area. Inc.*, 155 Mich. App. 484, 487-90, 400 N.W.2d 653, 655-56 (1986) (skier collided with another skier), *appeal denied*, 428 Mich. 864 (1987).

Most recently in *Lewis v. Canaan Valley Resorts, Inc.*, 408 S.E.2d 634 (W. Va. 1991), the Supreme Court of West Virginia upheld its skiing responsibility act against an equal protection challenge. The court found the holding of *Brewer v. Ski Lift, Inc.*, 762 P.2d 226 (Mont. 1988) to be unpersuasive. The court also noted that the language of the Idaho Act is very similar to that of the West Virginia Act and cited the *Northcutt* decision of the Idaho Supreme Court. In rejecting the equal protection challenge the court announced that its holding was in conformity with nearly all of the courts deciding such challenges to similar legislation. 408 S.E.2d at 639-644.

The court of appeals refused to substitute its own judgment for that of the Idaho Legislature. This Court should do the same. If a classification has some reasonable basis it does not offend the constitution simply because it is not made with mathematical nicety or because in practice it results in some inequity. Perfection in making necessary classifications is neither possible nor necessary. *Schweiker v. Wilson*, 450 U.S. 221 (1981).

III. THIS COURT SHOULD DECLINE THE INVITATION TO REGULATE SKIING AND OTHER RECREATIONAL SPORTING INDUSTRIES

Petitioners invite this Court to grant a writ in order to provide guidelines regarding the regulation of liability in skiing and other sporting industries. (Pet. pp. 23-24). This Court should decline the invitation. Skier responsibility statutes have been passed in at least twenty (20) states. (Pet. App. pp. 88a-152a). Moreover, state courts of

last resort have interpreted their respective unique statutes. Legislatures have passed recreational use statutes in other settings as well.[3] Regulation of recreational sporting industries is a legislative task. Petitioners' invitation for this Court to review this case for the purpose of regulating recreational sports is wholly inconsistent with the principles governing this Court's discretionary jurisdiction on certiorari.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[3] For example, state legislatures have passed legislation providing responsibilities and liabilities for recreational outfitters and guides, Idaho Code §6-1201 *et seq.*; W. Va. Code, 20-3B-1 *et seq.*; operators of certain equestrian activities, Idaho Code §6-1801 *et seq.*; W. Va. Code, 20-4-1 *et seq.*; and landowners who do not charge the public for recreational use of their land, Idaho Code §36-1604; W. Va Code, 19-25-1 *et seq.*